CONNELLY, MICHALE KARNES. G. C. Simkins et al. v. Moses H. Cone Memorial Hospital et al.: A Landmark Decision. (1969) Directed by: Dr. Richard Bardolph. pp. 116

This thesis is a study of G. C. Simkins v. Moses H. Cone Memorial Hospital, a civil rights case that originated in Greensboro, North Carolina. Although the courts had prohibited racial discrimination in a variety of institutions since the 1954 desegregation decisions, discrimination against Negro doctors and patients was widespread until 1964 when Simkins was decided. Medical facilities employed a number of discriminatory methods, and a national law, the Hill-Burton Act, provided for federal grants to "separate but equal" hospitals. In Simkins, the court found these hospitals sufficiently involved with government to render them subject to the Fourteenth Amendment's prohibitions against racial discrimination and held unconstitutional the section of the Hill-Burton Act which permitted this discrimination.

The case itself served as a precedent for similar litigation, but its significance did not stop there. As a result of the decision, Congress finally amended the Hill-Burton Act to end the financing of "separate but equal" medical facilities, something it had refused to do only a year earlier. Simkins was decided while the Senate was considering the 1964 Civil Rights Bill, and although the case may not have been the only factor insuring passage of Title VI of that bill, it certainly ended the possibility that exceptions would be written into the law. Virtually all programs receiving federal assistance after January 1965 were required to be free of racial discrimination in compliance with Title VI of the 1964 Civil Rights Act. Simkins took the first step: Congress followed.

The Simkins decision also wrote a new concept of state action into constitutional law. Since 1883 the courts have been bound by the principle that the Fourteenth Amendment does not apply to private actions but to those of the state. Gradually the judiciary has included the actions of many private institutions in the scope of the Fourteenth Amendment, but, with the new test developed in Simkins, practically any private institution may be within the reach of the Constitution. In Simkins the court took another step away from the 1883 Civil Rights Cases without overruling the precedent established in that decision. Perhaps that decision has been overruled--for if the line between state and private action has not been erased, it has been shifted to include many formerly private institutions within the definition of state action.

On the basis of its impact on racial discrimination and its effect on constitutional law, G. C. Simkins v. Moses H. Cone Memorial Hospital is clearly a landmark decision.

G. C. SIMKINS ET AL. V. MOSES H. CONE MEMORIAL HOSPITAL ET AL.: A LANDMARK DECISION

by

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INTRODUCTION

The Constitution of the United States is a living thing, continually growing. A large part of its growth in the past decade has been a result of the "Negro revolution." The era of desegregation officially began in 1954 when the Supreme Court held racial segregation in public schools to be uncomstitutional,[1] and by 1963 the courts had struck down racial discrimination in a variety of institutions. One area that desegregation had not reached, however, was medicine, especially the hospital. It was with this institution that G. C. Simkins et al. v. Moses H. Cone Memorial Hospital et al. was concerned.[2]

The Simkins case is of interest because it dramatizes the problems of racial discrimination in hospitals, but is its study justified otherwise? Some felt the case was as significant as the 1954 school desegregation decisions, but was the decision one that can be designated "landmark?" Did it have a marked effect on discrimination in hospitals? Were its effects on constitutional law of consequence? These are the questions with which this paper is concerned.

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[1] Brown v. Board of Education of Topeka, 347 U. S. 483 (1954) and Bolling v. Sharpe, 347 U. S. 497 (1954).

[2] G. C. Simkins v. Moses H. Cone Memorial Hospital, 211 F. Supp. 628 (M. D. N. C. 1962), 323 F. 2d 959 (4th Cir. 1963), cert. denied, 376 U. S. 938 (1964).

CHAPTER I

RACIAL DISCRIMINATION IN UNITED STATES HOSPITALS: A NATIONAL PROBLEM

The victim of an automobile accident was driven to the nearest Mississippi hospital, one arm nearly ripped from her body. Upon arrival she was greeted with "We don't take Negroes," and sent to another hospital. Enroute, Bessie Smith, the great jazz singer, bled to death.[1] This incident occurred in 1937, but it could have happened as recently as five years ago. Although the most likely location for such happening was the South, the North could not claim to be free of discrimination. Since the Civil War, discrimination in medicine has existed and it has respected no boundaries.

The quality of medical treatment afforded the Negro while under slavery is subject to various interpretations. Fanny Kemble wrote of her shock at seeing sick slaves lying on the floor without mattress or pillow on filthy, ragged blankets in the infirmary of her husband's plantation.[2] This was probably the exception rather than the rule on plantations, however. Generally speaking, slaves represented a tremendous

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[1]Edward Albee dramatized this story of hospital discrimination in a play entitled "The Death of Bessie Smith" which was produced on Broadway in 1961. The Zoo Story; The Death of Bessie Smith; The Sandbox: Three Plays Introduced by the Author (New York: Coward-McCann, 1960). For accounts of other Negro leaders who have been victims of similar hospital discrimination, see Langston Hughes, Fight For Freedom: The Story of the NAACP (New York: W. W. Norton and Company, Inc., 1962), pp. 161-163.

[2]Francis B. Simkins, A History of the South (New York: Alfred A. Knopf, 1963), p. 127.

investment, an investment that was carefully protected. For most slaveholders, " . . . a sick Negro was a liability and a dead Negro was worth nothing."[3] Under slavery, the health of the Negro was as good as that of his white neighbors, and in some areas the Negro mortality rate was even lower.[4]

It was after emancipation that the Negro's medical problems really began. Suddenly left on his own and usually poor, he could not afford the medical care he required. With time, his economic position improved somewhat, but a variety of obstacles appeared to prevent his obtaining needed medical attention. By the 1930's patterns of discrimination were well crystallized. Segregation and discrimination were sanctioned and, indeed, required, by law in the South, and by custom in many northern hospitals.[5]

Patterns of Discrimination

In 1944 Gunnar Myrdal wrote, "Area for area, class for class, Negroes cannot get the same advantages in the way of prevention and cure of disease that the whites can."[6] As recently as 1963, racial discrimination in medicine was cited as the principal reason that " . . . Negro infant mortality is from two to five times greater than

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[3] Ibid.

[4] Max Seham, "Discrimination Against Negroes in Hospitals," New England Journal of Medicine, CCLXXI (October, 1964), 940.

[5] Paul B. Cornely, "Segregation and Discrimination in Medical Care in the United States," American Journal of Public Health, XLVI (September, 1956), 1074. Gunnar Myrdal also noted that "Even in the North there are many private hospitals which do not accept Negro patients." An American Dilemma: The Negro Problem and Modern Democracy (New York: Harper and Brothers Publishers, 1944), p. 344.

[6] Myrdal, p. 171.

white infant mortality, why white women are five times less likely to die in childbirth than Negro women, and why Negro life expectancy is almost seven years less than white life expectancy."[7] The products of discrimination--unequal educational opportunities, the shortage of Negro doctors, the inability of Negro doctors to obtain staff privileges in first-rate hospitals, inadequate health facilities for Negroes, the virtual exclusion of Negro doctors from the major professional organization--have combined to produce a common result: poor health conditions for all Negroes.

Although discrimination has existed in many sectors of medicine, it has perhaps been most injurious to the Negro in the area of hospital facilities. Because of the complexity of modern medicine, the hospital is the center of treatment and cure of disease. And, of course, access to hospital facilities is vital for the doctor as well as the patient.[8]

The White-Only Hospital

One of the most conspicuous forms of hospital discrimination is exemplified by the all-white hospital. The disadvantages afforded the Negro by complete segregation are quite obvious. As was probably the case with Bessie Smith, the time required to drive an emergency patient to another hospital might mean the difference between life and death.

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[7]Constance B. Motley, "Desegregation, What it Means to the Medical Profession and the Responsibilities it Places on the Negro Professional," National Medical Association Journal, LV (September, 1963), 442.

[8]"The most important single element in the continued education of physicians is affiliation with a hospital." Dietrich C. Reitzes, Negroes and Medicine (Cambridge: Harvard University Press, 1958), p. 275.

In some areas, hospital facilities might not be available to Negroes at all.[9]

In view of the white-only hospital which existed everywhere, Negroes began setting up their own separate institutions. Negro hospitals, however, where they existed, did not necessarily remedy the situation. The all-Negro hospital was usually inferior to its white counterpart because, "Under the present plan of privately owned duplicating hospital setups, new institutions are beyond the financial reach of Negroes and they must, therefore, accept 'cast-offs' . . ."[10] Thus, as a result of a completely segregated hospital system, "None, second, third or fourth rate hospitals have largely been the portion of the Negro people."[11]

The evils of this segregated system were noted as early as 1940 by the Council of Medical Education and Hospitals which reported that

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[9]This was the situation in some counties in North Carolina in 1940 as is shown in the following table. For statistics on every county in North Carolina see Clarence Poe, ed., Hospital and Medical Care for all our People: Report of the Chairman and Sub-committees of the North Carolina Hospital and Medical Care Commission, 1944-45 (Raleigh: North Carolina Medical Care Commission, 1947), pp. 82-84.

County	White Population	Hospital Beds for Whites	Negro Population	Hospital Beds for Negroes
Chatham	16,814	18	7,912	0
Johnston	50,349	35	13,449	0
Person	15,827	25	9,202	0
Sampson	30,828	6	16,612	0
Swain	11,797	28	380	0

[10]William M. Cobb, "Medical Care and the Plight of the Negro," The Crisis, LIV (July, 1947), 208.

[11]Ibid., 201.

added and better hospital facilities were needed by the Negroes of the South and that " . . . the interests of the colored race would be best served by making provision for them in institutions designed to serve the entire population rather than by the establishment of separate hospitals caring for Negroes only."[12] During the 1940's there was a crescendo of voices calling attention to the injustices of segregation in medical facilities but "separate but equal" facilities continued to exist and were still being built (with the aid of federal funds) as late as 1964.[13]

Hospitals Admitting Negro Patients

Hospitals that admitted Negro patients as well as whites might discriminate in a variety of ways. Separate lounges, water fountains, rest rooms, entrances, exits and snack bars could be expected. But more important, there were usually conditions for the admittance of Negroes that did not apply to white patients. The hospital might have been a white-only institution that accepted Negroes only if they were emergency cases. Should the Negro require hospitalization on any basis other than emergency, however, he would be refused admittance. Another type of restriction has been the admittance of Negroes to a white hospital

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[12]"Hospitalization of Negro Patients: A Report from the Council on Medical Education and Hospitals," American Medical Association Journal, CXV (October, 1940), 1461.

[13]In March of 1964 when the Supreme Court of the United States denied certiorari in the Simkins case, there were eight "separate but equal" projects in varying stages of construction. U. S. Commission on Civil Rights, Equal Opportunity in Hospitals and Health Facilities (Washington: U. S. Government Printing Office, 1965), p. 8.

if there were some facility or service available in that hospital which was not in the Negro institution. Empty hospital beds were not usually included in the definition of "facility or service." Therefore, the inability of the Negro institution to hospitalize a patient because of overcrowded conditions was not a factor which would allow a Negro to be admitted to the white hospital.

Many hospitals admitted Negro patients without putting either of these restrictions on them, but limited their number to only a few beds. When these beds were filled, even if there were vacant beds in the white section, no Negro patient was admitted. The quota system was considered a logical method of distributing hospital beds, and in many instances facilities allocated to Negroes corresponded almost exactly to their proportion of the population.[14] At first glance, this may seem fair enough, but sickness and accident do not necessarily follow population statistics. Moreover, the Negro's generally low economic state tended to increase his need for hospitalization.[15]

Perhaps the most widely publicized form of discrimination in hospitals has been the notorious "Jim Crow" ward--a separate ward, wing or building for Negroes, usually inadequate and inferior to the sections

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[14]For example, the report submitted annually by the North Carolina Medical Care Commission (the state's Hill-Burton agency) showed each year that the number of beds in each reporting area was proportionately equal to the division of population by race. As long as the state plan showed proportional equality in the number of beds for each race, the nondiscrimination requirement of the Hill-Burton Act was considered to have been met and hospitals could receive federal grants on a "separate but equal" basis. James D. Snyder, "Race Bias in Hospitals: What the Civil Rights Commission Found," Hospital Management, XCVI (November, 1963), 54.

[15]James A. Dombrowski, "Practices and Attitudes in Southern Hospitals," Modern Hospital, LXXIX (August, 1952), 78.

of the hospital that housed white patients. In 1951, a Negro minister recorded his impression of the separate facilities provided for members of his race:

> While pastoring in a southern city, I found one of the best members of my church on a rickety bed in the dingy basement of the city hospital. The place reminded me of a dungeon more than of a hospital. The stench that emitted from it was terrific. I felt chagrined, distressed, shocked beyond description. I did not think that any such condition could be found in Christian America.[16]

The basement ward had long been considered a "southern institution," but was it? Shaken by his experience, this minister decided to make a nationwide study of the hospitalization of his people. After visiting 170 cities in the forty-eight states he wrote: "I found conditions throughout the country just as deplorable and shocking as I had found them in the southern city. I found at the time that in a vast section of our country the Negro sick were being cared for principally in basements or in little annexes to the hospitals proper, which were entered from the rear."[17]

From the available evidence one could not draw the conclusion that all, or even most, Negro patients were shut away in dark, filthy, inferior sections of hospitals where they were practically left to die. The extent to which such conditions existed is unknown. Such conditions, however, did exist.

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[16]Amos H. Carnegie, " . . . But Integration is Empty Talk," Modern Hospital, LXXIX (June, 1951), 55.

[17]Ibid., 56.

The Negro Doctor's Plight

Because it is virtually impossible to practice medicine without being a member of a hospital staff, many of the Negro doctor's complaints have centered around hospital policies. He could not hope to obtain staff privileges in a white-only institution. If there were a separate hospital for Negroes, he and his patients of course had access to its facilities, but what if there were no Negro hospital, or if his patient needed a service that could only be furnished by a predominantly white hospital that admitted Negro patients? In most cases, the Negro physician had to turn his patient over to a staff member of the white hospital—a white physician. The hospital, though it would admit the Negro patient, did not give Negro physicians positions on its staff. In the 1940's there were only a few hospitals in the United States where Negro and white doctors worked together equally.[18] The situation was not much altered by 1963 when Dr. John A. Kenney, outgoing president of the all-Negro National Medical Association, cited "the difficulty in becoming a full-fledged staff member of a hospital" as the Negro doctor's "current central grievance."[19]

Several obstacles have kept Negro doctors from obtaining staff positions in predominantly white hospitals, the most common being the requirement that the applicant be a member of the local affiliate of the American Medical Association. Until recently, this was an almost

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[18]Myrdal, p. 323.

[19]New York Times, August 13, 1963, p. 22.

impassable barrier.[20] "The record of treatment of the Negro by the American Medical Association and its component societies over the past century is one of Jim Crowism in every aspect of the practice of medicine."[21] In 1895 Negro doctors organized their own society, the National Medical Association because "The American Medical Association slammed the door and shut us out, . . ."[22] Although the National Medical Association has met many of the Negro doctor's needs, membership did not help him get a hospital staff appointment.

If he were a member of the local medical society, the Negro doctor faced still another problem. He was required (just as were white applicants) to obtain the personal endorsement in writing of two members of the existing hospital staff--two white physicians. White doctors were reluctant to endorse Negro applicants for several reasons. Sometimes they felt that the Negro's training was not adequate. As Myrdal wrote in 1944, "The fact that the Negro doctor has such small opportunities for hospital training and specialized work is the reason why there is some justification for the belief that the Negro is less well trained than the white man as a physician or surgeon."[23] Before the widespread

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[20] Membership in the AMA is controlled entirely by each local branch. This policy has allowed widespread discrimination against Negroes, especially in the southern units which almost invariably set up white-only policies. By 1963 the barriers had begun to come down. About one-half of the members of the NMA also belonged to the AMA. Although many local units still practiced discrimination, only in one state, Louisiana, did the AMA branches have a statewide policy of admitting whites only. New York Times, August 13, 1963, p. 22.

[21] Max Seham, "Discrimination Against the Negro in Medicine," National Medical Association Journal, LVI (March, 1964), 155.

[22] Ibid.

[23] Myrdal, p. 324.

integration of medical schools in the 1950's[24] and the subsequent acceptance of Negroes for internships in many hospitals, this was very definitely a factor.[25] Secondly, the white physician usually did not know the Negro applicant very well--their paths rarely crossed--and he was understandably hesitant to sponsor the application of a physician about whom he knew little. Then, too, race bias was a factor not to be discounted.

Thus, for the most part, the Negro doctor had to practice medicine in hospitals for his race only, or in no hospital at all.

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[24]"The number of Negroes in predominantly white medical schools has increased considerably since 1947, when there were only 93 Negroes in 20 predominantly white medical schools. In 1955-1956 there were 216 Negro students in 48 of these schools. . . . By 1958 the qualified Negro applicant had opportunities for acceptance in a first-rate medical school equal to those of qualified white applicants. There is evidence also that those medical schools having Negro students would have accepted more, had more qualified Negroes applied. Indeed, a number of medical schools have actively sought Negro candidates who can meet their entrance standards." National Medical Fellowships, New Opportunities for Negroes in Medicine (Chicago: National Medical Fellowships, 1965), p. 10.

[25]In the introduction to Negroes and Medicine it was noted that things had certainly changed since 1931 when Negroes faced the risk of having to go without an internship: " . . . not only are there adequate internships and residencies available to Negroes, but also most of these positions are in predominantly white institutions." In 1947, of the 119 graduates of Howard and Meharry, 49 served internships in 8 predominantly white hospitals. In 1956, of 129 graduates of Howard and Meharry, 77 served internships in 46 predominantly white hospitals. This means that 60 per cent of the graduates of the two Negro medical schools in 1956 served their internships in non-Negro hospitals. The Negro graduates of predominantly white medical schools take internships and residency training in predominantly white hospitals to an even greater degree than Howard and Meharry graduates. Reitzes, p. xxv.

The Evidence: Surveys Concerning Discrimination in Hospitals

Can the generalizations concerning discrimination be supported by dates, places and figures? At any given point in history, how many hospitals in the United States admitted only white patients, how many admitted white and Negro on an equal basis, how many discriminated against Negro patients and physicians in the various ways described in the preceding pages? The statistics necessary to present a complete picture simply do not exist. Racial policies with respect to doctors and patients varies from hospital to hospital and for this reason most data on the subject must be derived from surveys which measure only a sample. Some conclusions, however, can be drawn from these sources.

Southern Conference Educational Fund Survey

In 1952 the results of a survey that had recently been conducted by the Southern Conference Educational Fund concerning the Negro's hospital treatment were made known.[26] Administrators of the 2414 hospitals listed by the American Hospital Association Directory for eighteen southern and border states and the District of Columbia were questioned about their racial policies. From 29.9 per cent (711 hospitals) came usable replies. Of the 711 hospitals, 584 (82 per cent) admitted Negro patients. Only 108 of these (exclusive of federal and all-Negro institutions) allotted hospital beds according to need, not race. Of the 108 hospitals, 68 practiced neither segregation nor the quota system; 40 practiced segregation but allotted beds according to need. Because 406 hospitals

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[26]The results were published in an article by James A. Dombrowski (then, the director of the Southern Conference Educational Fund), "Practices and Attitudes in Southern Hospitals," Modern Hospital, LXXIX (August, 1952), 78-79.

admitted Negroes on a strict quota system and 127 hospitals were white-only in the 676 institutions (35 federal and special hospitals excluded), only 33,451 (32.4 per cent) of the 102,969 beds were available to Negroes.

The 32.4 per cent of hospital beds allotted to Negroes closely followed their percentage of the region's population, but the evils of the quota system have already been discussed. Further, the survey showed that in several states (Louisiana and South Carolina particularly) Negro hospital space was concentrated in one or two large institutions. This was naturally a great handicap for blacks living in areas any significant distance from these hospitals.

A Study of Fourteen Selected Communities

In 1956 Dietrich C. Reitzes conducted a survey on which he based his book, Negroes and Medicine. Fourteen communities, containing over one-fifth of all nonwhites and more than a third of all Negro physicians in the United States, were studied. Table 1 (page 14) illustrates what he found.

The statistics on the communities speak for themselves. In only two of these, Gary and New York, had a substantial portion of the Negro physicians abtained staff positions in predominantly white hospitals. With the exception of Gary, the highest percentage of these hospitals that accepted Negro physicians was 51.7 per cent in New York. In three of the southern communities no Negro doctors had staff privileges in any of the predominantly white institutions.

The whole picture presented by these figures is even more indicative of the problem Negro physicians faced in obtaining staff positions. Of

TABLE 1

INTEGRATION OF STAFFS OF PREDOMINANTLY WHITE HOSPITALS IN FOURTEEN COMMUNITIES: 1956[a]

Community	Negro Physicians	Negro Physicians Affiliated with Predominantly White Hospitals	Predominantly White Hospitals	Predominantly White Hospitals with Negro Physicians on staff
Gary, Indiana	17	14	2	2
New York, New York	51	36	29	15
Philadelphia, Pennsylvania	142	40	51	19
Los Angeles, California	121	30	18	7
Indianapolis, Indiana	26	6	6	3
Boston, Massachusetts	19	4	28	4
Detroit, Michigan	160	25	30	12
St. Louis, Missouri	85	9	27	6
Chicago, Illinois	226	16	65	8
Kansas City, Missouri	37	2	9	2
Washington, D. C.	224	8	20	6
Atlanta, Georgia	36	0	10	0
New Orleans, Louisiana	48	0	13	0
Nashville, Tennessee	30	0	6	0

[a]Statistics in this table were taken from Reitzes, Negroes and Medicine, p. 331, Table 68. "Rank order of integration of fourteen selected communities by percentage of predominantly white hospitals with Negro physicians on their staffs, 1956" and Table 67. "Rank order of integration of fourteen selected communities by percentage of Negro physicians with appointments in predominantly white hospitals, 1965."

a total of 1222 Negro doctors, only 190 (15.5 per cent) enjoyed staff privileges in predominantly white hospitals. Only 84 of 304 predominantly white institutions (27.6 per cent) employed Negro physicians. Although these statistics do not apply to the United States as a whole, because of the high percentage of Negroes and Negro doctors in these communities, they may be considered a significant indication of hospital racial policies in the United States in 1956.

The United States Civil Rights Commission Report

Because of persistent complaints of discrimination against Negroes by hospitals, the Civil Rights Commission launched an investigation of this problem in 1960.[27] The survey covered hospitals in counties having a concentration of Negroes (at least 5,000 in a total population of 250,000). Three hundred and ninety-eight hospitals in 34 states (45 in the border states, 130 in southern states, and 214 in northern and western states) were sent questionnaires. Of these, 219 hospitals replied.

A policy of admission without regard to race was claimed by 175 hospitals, but many that reported no racial barriers also said that separate facilities were provided for Negroes. Eleven hospitals answered that they served one racial group only (one for Indians, five for Negroes and five for whites), but 29 hospitals failed to answer this question. In the South, 84.5 per cent of the 22 reporting admitted to practices of racial segregation or exclusion. Only two of the 133 hospitals studied in the northern and western states reported any type of segregation.

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[27] A summary of the report may be found in an article by James D. Snyder, "Race Bias in Hospitals: What the Civil Rights Commission Found," Hospital Management, XCVI (November, 1963), 52-54.

Although the Civil Rights Commission Report indicates almost no discrimination against Negro patients in the North and West, the study Reitzes conducted only four years earlier indicates that widespread discrimination against Negro doctors existed in these geographic areas as well as others.[28] Thus, racial prejudice in medicine was a factor in all areas of the United States. Admittedly one that weighed most heavily in southern and border states, racial discrimination in medicine was a national problem.

The Hill-Burton Act

The fact that racial discrimination could be found throughout the entire United States is not the only reason that it might be considered a national problem. Dr. John Kenney noted in 1963 that "Racial discrimination among the nation's hospitals is particularly out of order since some 6,000 hospitals have benefited from the $2,000,000,000 in federal construction funds under the 1946 Hill-Burton Act."[29] The degree of

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[28]The problem of staff appointments still plagues Negro doctors in the North. In 1966, John L. S. Holloman, then President of the NMA, pointed out that 95 per cent of the Negro physicians practicing in New York City did not hold staff appointments at any of the major medical facilities. He continued, "The northern style of defacto [sic] segregation which exist [sic] on the hospital staffs of our major metropolitan areas is a fact of life which must be dealt with. This type of racial discrimination in the health facilities of the North is just as deadly as it is in the South, but it is far most sophisticated and carefully camouflaged, under disguises which often times defy detection. I know it is there! You know it is there! In the past, too often, any attempts to prove that it is there have been met with utter and absolute frustration." John L. S. Holloman, "A New Horizon," Inaugural Address made before the meeting of the National Medical Association, Washington, D. C., August 9, 1966 (mimeographed), pp. 9-10.

[29]New York Times, August 13, 1963, p. 22.

government involvement with hospitals is made even more apparent by the fact that there were only 7,138 hospitals in the country in 1963.[30] On the basis of these figures, approximately 85 per cent of the hospitals in the United States had received federal aid under the Hill-Burton Act.

Years of depression and World War II resulted in a need for government aid to hospitals. Although the first three decades of the twentieth century were ones of rapid growth in the number of hospitals, after 1929, not only did the construction cease, but between 1928 and 1938 nearly 800 hospitals went out of business.[31] This decrease, combined with the increase in population, drastically reduced the ratio of hospitals to people. As a result, the Commission on Hospital Care was organized in October, 1944, to study the nation's hospital needs. The commission endorsed the principle of federal and state cooperation to assist in hospital construction as a remedy, and, acting on this suggestion, Congress passed the Hospital Survey and Construction Act in 1946.

This law, commonly known as the Hill-Burton Act, because it was sponsored by Senators Lister Hill and Harold Burton, authorized federal grants to states for surveying hospital needs, developing state plans for construction of facilities and for assisting in the construction and equipment of public and voluntary nonprofit private health facilities.[32]

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[30]This figure refers to hospitals registered with the American Hospital Association, taken from a statistical profile of U. S. hospitals in Hospitals, Journal of the American Hospital Association, XXXIX (August, 1965), 431.

[31]U. S. Department of Health, Education and Welfare, Two Decades of Partnership (Washington: U. S. Government Printing Office, 1966), p. 9.

[32]The law has been amended several times to broaden the program to include such things as grants for construction of nursing homes, rehabilitation and chronic disease facilities, as well as grants for hospital research. See U. S. Department of Health, Education and Welfare, Hill-Burton Program Progress Report: July 1, 1947-June 30, 1965 (Washington: U. S. Government Printing Office, 1965).

The aid was to be made available through annual Congressional appropriations. Appropriations were then to be allotted to the states according to a formula based on population and per capita income. The grants ranged from one-third to two-thirds of the total cost of construction and equipment.

The Surgeon General of the United States was made administrator of the Hill-Burton program. He was given the responsibility of issuing regulations (subject to the approval of the Secretary of the Department of Health, Education and Welfare, and of the Federal Hospital Council) establishing standards for state plans. On the state level, the program was to be administered by an agency established for that purpose, with the responsibility for surveying all existing health facilities in that state to determine what was needed. On the basis of these surveys, state plans were to be prepared and submitted for the approval of the Surgeon General. If the state plan were approved by the latter, periodic federal payments were to be made to the state agency for disbursement to the hospitals.

The passage of the Hill-Burton Act was generally heralded as a step forward in the struggle to maintain adequate health care for the American people. It was not, however, without its critics. As early as 1948, it was noted that the Negro might not share equally in this program: "Indications have appeared that in the South and, indirectly, in parts of the North, various subterfuges will be used to avoid compliance with the nondiscrimination clause of the Hill-Burton Hospital Survey and Construction Act."[33] Subterfuge, however, was hardly necessary. The nondiscrimination

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[33]William M. Cobb, "Progress and Portents for the Negro in Medicine," The Crisis, LV (April, 1948), 107.

clause itself provided that the Surgeon General should prescribe by regulation:

> (f) That the State plan shall provide for adequate hospital facilities for the people residing in a State, without discrimination on account of race, creed, or color, . . . Such regulation may require that before approval of any application for a hospital or addition to a hospital is recommended by a State agency, assurance shall be received by the State from the applicant that (1) such hospital or addition to a hospital will be made available to all persons residing in the territorial area of the applicant, without discrimination on account of race, creed, or color, but an exception shall be made in cases where separate hospital facilities are provided for separate population groups, if the plan makes equitable provision on the basis of need for facilities and services of like quality for each such group; . . . [34] (emphasis mine)

On November 14, 1946, the regulation provided for was approved by the Federal Hospital Council:

> 53.62 Nondiscrimination. Before a construction application is recommended by a State agency for approval, the State agency shall obtain assurance from the applicant that the facilities to be built with aid under the Act will be made available without discrimination on account of race, creed, or color, to all persons residing in the area to be served by that facility. However, in any area where separate . . . facilities are provided for separate population groups, the State agency may waive the requirement of assurance from the construction applicant if (a) it finds that the plan otherwise makes equitable provision on the basis of need for facilities and services of like quality for each such population group in the area, and (b) such finding is subsequently approved by the Surgeon General. Facilities provided under the Federal Act will be considered as making equitable provision for separate population groups when the facilities to be built for the group less well provided for heretofore are equal to the proportion of such group in the total population of the area, except that the State plan shall not program facilities for a separate population group for construction beyond the level of adequacy for such group.[35] (emphasis mine)

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[34] Hospital Survey and Construction Act, in U. S., Statutes at Large, LX, 1043.

[35] U. S., Federal Register, XII, 6875.

In terms of racial policy, then there were two types of facilities that could be constructed with Hill-Burton funds: "separate but equal," and nondiscriminatory.

A grant could be approved for an all-white or all-Negro hospital if the locality were one that had separate institutions for separate population groups. The Surgeon General, in his regulation, interpreted "equitable provision" to mean that the facilities built for each group must be equal to the proportion of that group in the population of the area. Sponsors of all hospital projects were required to submit a form which read:

> No person / certain persons (cross out one) in the area will be denied admission to the proposed facilities as patients because of race, creed, or color.[36]

If the words "no person" were crossed out, the state agency had to indicate on a separate form that:

> The requirement of nondiscrimination has been met because this is an area where separate facilities are provided for separate population groups and the state plan otherwise makes equitable provision, on the basis of need, for facilities and services of like quality for each such population group in the area.[37]

Thus, the federal government adopted the quota system as a basis for permitting the establishment of "separate but equal" facilities.

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[36]Jack Greenberg et al., "In the United States Court of Appeals for the Fourth Circuit, G. C. Simkins, Jr., et al. and United States of America, Appellants v. Moses H. Cone Memorial Hospital, a Corporation et al., Appellees, On Appeal from the United States District Court for the Middle District of North Carolina, Appellants' Appendix," (1963), p.93a. Cited hereafter as "Appellants' Appendix."

[37]Ibid., p. 101a.

Although in 1954 the Supreme Court pronounced the first in a series of decisions declaring "separate but equal" public facilities unconstitutional, the racial policies governing the administration of the Hill-Burton program did not change. Between 1946 and 1963 approximately seventy separate health facilities (less than 1 per cent of all Hill-Burton projects) were constructed for either white or Negro patients.[38] Of the eighty-nine grants going to these seventy "separate but equal" institutions, only thirteen were for Negro facilities. The federal contribution totaled $36,775,994: $4,080,308 of it went to projects for Negro use.[39]

Nearly 7,000 Hill-Burton projects constructed between 1946 and 1963 were of the "nondiscriminatory" variety.[40] Sponsors of "nondiscriminatory" institutions were required to assure that the facilities would be available to all persons without discrimination on account of race, creed, or color. But the nondiscriminatory requirement was interpreted by the Department of Health, Education and Welfare to mean that no person could be denied admission as a patient because of race, creed, or color to that portion of the facility constructed with federal funds. He could, however, be denied admission to other portions of the facility.[41] Patients

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[38] U. S. Commission on Civil Rights, Equal Opportunity in Hospitals and Health Facilities, p. 5.

[39] James D. Snyder, Hospital Management, XCVI, 54.

[40] U. S. Commission on Civil Rights, Equal Opportunity in Hospitals and Health Facilities, p. 5.

[41] Ibid.

could be segregated within the facility, professionally qualified persons could be denied staff privileges, and interns could be denied training on account of race, creed, or color.[42]

Racial discrimination in hospitals was a problem of national proportion. Could federal law permit racial discrimination by institutions which received government grants? Could private hospitals by virtue of their participation in the Hill-Burton program be held subject to the constitutional prohibitions against racial discrimination? Several Greensboro, North Carolina, physicians and dentists decided to find out.

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[42] Ibid., p. 6.

CHAPTER II

LITIGATION BEGINS

The North Carolina Setting

It was fitting that the suit which challenged the constitutionality of the "separate but equal" clause of the Hill-Burton Act should arise in North Carolina. The federal government had helped build more separate medical facilities there than in any other state. By 1963 there had been 31 such projects constructed in North Carolina with Hill-Burton funds, 27 for whites and 4 for Negroes.[1]

Despite continued construction of separate facilities, according to statistics on hospitals receiving assistance from the Duke Endowment, the pattern appears to have been breaking down between 1945 and 1960. Of the 89 general hospitals listed in 1945, there were 20 white-only, 58 open to both races, and 11 Negro-only.[2] By 1960, however, of 122 hospitals, 14 were white-only, 97 Negro and white, and 11 Negro-only.[3] White-only institutions were decreasing in number as institutions open to Negroes and whites were increasing. It does not therefore follow,

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[1]Snyder, Hospital Management, XCVI, 54.

[2]Duke Endowment, The Duke Endowment Year Book (Charlotte: Duke Endowment, 1946), pp. 17-20.

[3]Duke Endowment, Annual Report of the Hospital and Orphan Sections, 1960 (Charlotte: Duke Endowment, 1961), pp. 26-29.

however, that there was less discrimination.

Discrimination may be defined in many ways. North Carolina hospitals operated on a quota system in the allotment of beds. If discrimination within this quota system is examined, the state had certainly changed since 1928 when 84 per cent of the hospital beds were alloted to whites (then 70 per cent of the state's population) and 16 per cent were set aside for the 30 per cent of the population that was Negro.[4] On the basis of data available for a majority of the hospitals in North Carolina, since 1940 the percentage of hospital beds alloted to members of the Negro race has been roughly equal to their proportion of the state's population, about 25 per cent.[5] (See Table 2, p. 25 and Table 3, p. 26.) Even the equality within the system, however, is open to question. Did proportional equality exist in fact as well as on paper?[6] Certainly the actual equality of the facilities themselves might be challenged.[7]

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[4]Julius Rosenwald Fund, Negro Hospitals: A Compilation of Available Statistics (Chicago: Julius Rosenwald Fund, 1931), p. 24.

[5]Although a survey of 122 N. C. hospitals in 1960 found that there were 10,797 beds classified as white (79.6 per cent) and 2,771 as Negro (20.4 per cent) ("Integration Battlefront," National Medical Association Journal, LV [January, 1963], 57.), the percentages in Table 2, p. 25, are probably more indicative of the general pattern of bed allotment because a larger portion of the total hospitals was studied and because the state plans submitted by the North Carolina Medical Care Commission showed proportional equality in hospital beds for both races.

[6]James Snyder suggests that one failing of the Public Health Service was that it only asked the state agencies to show that proportional equality existed--not prove it. Hospital Management, XCVI, 54.

[7]With regard to medical facilities in N. C. it was stated, "The state committee found that facilities in the all Negro hospitals were not comparable with those in the state's leading or average white institutions." "Integration Battlefront," National Medical Association Journal, LV, 57.

TABLE 2

PERCENTAGE OF HOSPITAL BEDS AVAILABLE TO NEGROES
IN A MAJORITY OF NORTH CAROLINA HOSPITALS[a]

Year	Total Hospitals in N. C.	Hospitals Assisted by the Duke Endowment				
		Total Hospitals	Total Beds	Beds Available to Whites	Beds Available to Negroes	Percentage of Beds Available to Negroes
1940	. .	120	7297	5443	1854	25.4
1945	. .	120	8878	6552	2326	26.5
1950	179	139	10502	7508	2994	28.5
1955	181	145	12106	. .[b]	. .[b]	. .
1960	171	145	14875	11049	3846	25.8

[a]Calculated from: "Statistical Profile of United States Hospitals," Hospitals Guide Issue, American Hospital Association Journal, XXV (June, 1951), 101; XXX (August, 1956), 48; XXXV (August, 1961), 422; and Duke Endowment, "Statistics Relating to Beds Assigned for the Care of Negro Patients, 1940-64," August, 1966.

[b]The statistics necessary to make a complete entry were not given in Duke Endowment, "Statistics Relating to Beds Assigned for the Care of Negro Patients, 1940-64."

TABLE 3

NEGRO PERCENTAGE OF NORTH CAROLINA POPULATION[a]

Year	Total Population of N. C.	Negro Population of N. C.	Negro Percentage of N. C. Population
1940	3,571,623	981,298	26.7
1950	4,061,929	1,047,353	25.7
1960	4,555,155	1,116,021	24.5

[a]Derived from: U. S. Bureau of the Census, Statistical Abstract of the United States (Washington: U. S. Government Printing Office, 1965), p. 11.

The real problem lay with the quota system itself. In spite of proportional equality in availability of hospital beds, the North Carolina Advisory Committee received complaints that some hospitals aided by Hill-Burton funds had not maintained an adequate ratio of beds and space to meet the needs of Negro patients.[8] By interpreting "equitable provision" for separate population groups to mean simply that 25 per cent of the population should be alloted 25 per cent of the medical facilities, the Public Health Service had overlooked the fact that the medical needs of a group might exceed its proportion of the population.

Greensboro, N. C.

In 1962, when suit was filed against two Greensboro hospitals and their directors, the city had three major hospitals: Moses H. Cone Memorial Hospital, Wesley Long Community Hospital, and L. Richardson Memorial Hospital. Long admitted only white patients and maintained an all-white hospital staff. Richardson served only the Negro population of Greensboro but had white as well as Negro doctors on its staff. The racial policy of Cone was more complicated, however.

Several months before the January, 1953, opening of Cone Hospital, quite a furor was created by the hospital's proposed policy of admitting Negroes. The problem was stated in a series of articles in the Greensboro Daily News.[9] Richardson officials who had struggled for a number of

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[8]North Carolina Advisory Committee to the United States Commission on Civil Rights, Equal Protection of the Laws in North Carolina (Washington: U. S. Government Printing Office, 1962), p. 184.

[9]Sam Stuart McKeel, "L. Richardson's Plight," November 23, p. 1; November 24, p. 1; November 25, 1952, p. 1.

years to keep their hospital on an even keel financially feared that the opening of the new hospital would be a final blow. Although officials at Cone had stated that admission of Negroes would be "controlled" (but had not yet set up a policy), it was felt that Negroes who were able to pay for medical care might patronize the new hospital. This would leave more indigents for Richardson, thus aggravating an already serious problem.

In light of this situation, the policy which the Board of Trustees of Cone Hospital adopted on December 11, 1952, was probably in the best interest of the Richardson Hospital.[10] The Board decided that in order to be considered for admission to Cone, a Negro must first have been admitted to Richardson Hospital. If his medical condition required facilities and services not available at Richardson, but available at Cone, a physician who was a member of the staffs of both hospitals could make a request for his transfer. If the request were approved by the administrator of Richardson and the admitting office of Cone, the patient was sent to Cone, where he was under the care of the doctor making the request for transfer. In February of 1960, the Board of Trustees amended the rule to allow direct admission of Negro patients to Cone under the same conditions.[11]

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[10]In the Greensboro Daily News Public Pulse, Dr. Jean C. McAlister stated, " . . . I was an ex-officio member of the L. Richardson Hospital Board of Trustees, and one of the fears of our board was that the Cone Hospital would put the L. Richardson Hospital out of business if it opened its doors wide to Negroes. It was in the interest of protecting the L. Richardson Hospital that the Cone Hospital adopted the rule that Negro patients would be admitted only if the facilities of the L. Richardson Hospital were inadequate for the care of a particular patient, . . ." April 3, 1962, p. 8.

[11]Cone Hospital's policy is given in detail in Greenberg et al., "Appellants' Appendix," p. 80a.

Cone Hospital admitted Negro emergency patients, although they were transferred to Richardson as soon as possible. There were no "Jim Crow" waiting rooms, rest rooms, entrances or exits. There were no separate wards for Negro patients although whites and Negroes were not placed together in the same rooms.[12] Cone, however, had a policy of excluding Negro doctors and dentists from its staff. This meant that if a Negro patient needed to be treated at Cone and had a Negro physician, he was forced to discharge him and go under the care of one of the white physicians who was a staff member of both hospitals. This naturally worked a hardship on the Negro doctor as well as his patient.

Negro physicians and dentists in Greensboro made several attempts to remedy the situation before turning to the courts. Dr. George C. Simkins,[13]

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[12]Interview with Harold Bettis, Director of Cone Hospital, September 9, 1966.

[13]Dr. George C. Simkins, Jr., dentist and civil rights leader, was born in Greensboro, N. C. He attended public schools in Greensboro; Herzl Junior College in Chicago; Talladega College in Alabama; and Meharry Medical School, where he received his D.D.S. in 1948. After an internship at Jersey City Medical Center, he came back to Greensboro where he was employed by the Guilford County Health Department until 1955, when he entered private practice.

In December, 1955, Dr. Simkins, an excellent golfer and tennis player (as his trophy case attests), was arrested for playing on the city's segregated Gillespie Park Golf Course. Although the city had constructed and owned the course, it had leased it to a private club which discriminated against Negroes. This incident led to a significant decision in which the courts held that the right of citizens to use public property without discrimination on the basis of race may not be abridged by the mere leasing of the property. City of Greensboro v. Simkins, 149 F. Supp. 562 (M.D.N.C. 1956), 246 F. 2d 425 (4th Cir. 1957). Later, in 1962, Simkins was again forced to bring suit for discrimination, this time against two hospitals, and Simkins v. Cone Hospital was the result.

Dr. Simkins has been active in the National Association for the Advancement of Colored People and has served as president of the Greensboro chapter for the past ten years. Much of his time has been devoted to fight injustice, often at the expense of his professional career. It is little wonder that he was named Meharry Medical School's "Alumnus of the Year" in 1966 and is regarded as the spokesman for the Negro community in Greensboro in all matters involving discrimination.

a Negro dentist in Greensboro wrote letters to the officials of Cone and Long hospitals in March, 1960, asking that Negro patients be admitted to those institutions without restriction. He also requested that Negro physicians and dentists be allowed to treat their patients in both.[14] The problem was simple. The Richardson Hospital was overcrowded and many patients who needed hospitalization could not get in. This difficulty could be resolved at least partially if Long would open its doors to Negroes and Cone would drop the restrictions it placed on their admission.

Long Hospital acknowledged receipt of the requests in April. A. O. Smith, administrator of the hospital, said the requests would be given "due consideration," but no action was taken.[15] Harold Bettis, director of Cone Hospital, sent the Negro doctors applications for admission to the staff, however, and in May, the Board of Trustees refused to accept their applications.[16]

Renewed requests for staff appointments were made in late 1961 and early 1962. Dr. E. C. Noel, III, President of the Greensboro Medical Society, urged a "meeting of the minds," calling "prolonged controversy and litigation" an "obvious waste of time, energy, emotional tension, and money."[17] There was, however, no meeting of the minds.

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[14] Greensboro Record, April 6, 1960, p. 1.

[15] Greenberg et al., "Appellants' Appendix," p. 16a.

[16] Ibid., p. 15a.

[17] Greensboro Daily News, January 18, 1962, p. 1.

To The Courts

Dr. Simkins had already begun to contemplate the possibility of going to court. Early in 1961 a man had come into his office with an impacted molar and a temperature of 104 degrees. He called Richardson to get a bed for the patient but there was no room. He called Cone. There was room, but the patient could not be admitted.[18] The situation was not one which met the conditions of the policy for admitting Negro patients. Angered by the situation and feeling that this policy could not be defended in light of the hospital's receipt of Hill-Burton funds, Simkins wrote Jack Greenberg, General Counsel for the National Association for the Advancement of Colored People (NAACP). Greenberg replied that he was interested and would begin investigating the problem.

In Greensboro, the search for plaintiffs began. Simkins found six physicians (Drs. A. V. Blount, Jr., Walter J. Hughes, Norman N. Jones, Girardeau Alexander, E. C. Noel, III, and F. E. Davis), two other dentists (Drs. Milton Barnes and W. L. T. Miller), and two patients (A. J. Taylor and Donald R. Lyons) who were willing to sue with him. But there was another obstacle. Richardson Hospital was putting on a building drive for funds and some Negro doctors in Greensboro felt that the suit should be delayed for fear that it might hurt the drive. Consequently, the Greensboro Medical Society tried to table the motion that suit be brought against the two hospitals.[19] Feeling it was a matter too important to

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[18] Interview with George C. Simkins, May, 1965.

[19] Ibid.

be delayed, Simkins instructed his lawyer to file the suit and "let them read about it in the paper."[20]

The complaint was filed February 12, 1962, in the United States District Court for the Middle District of North Carolina in Greensboro by the plaintiffs' attorneys (Jack Greenberg, his assistants James M. Nabrit, III, and Michael Meltsner, and Conrad O. Pearson, State Counsel for the NAACP). The complaint stated that the six physicians and three dentists, all residents of Greensboro, sought admission to the staffs of Long and Cone hospitals but were denied this on the basis of race. Plaintiff A. J. Taylor had a gastric ulcer which required constant medical attention and he desired to enter either hospital and be treated by his own physician, Dr. E. C. Noel. Plaintiff Donald R. Lyons was suffering from an impacted molar and desired it removed in either of the hospitals by his dentist, Dr. George C. Simkins. Neither hospital would admit these patients and their physician or dentist to its facilities. The physicians and dentists claimed that they were suffering irreparable injury, including loss of earning and "deprivation of opportunity to develop the skills necessary for continued proficiency of their chosen professions."[21] The plaintiff patients held that the hospitals' policies caused them irreparable injury, "including deprivation of the opportunity of receiving medical care in the most complete medical facilities available in their locality and the use of said facilities

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[20] Ibid.

[21] Greenberg et al., "Appellants' Appendix," p. 16a.

with the treatment of their own physicians and dentists."[22]

As a remedy, the plaintiffs requested two injunctions against the defendant hospitals and their directors. The first would restrain the hospitals from enforcing the policy of denying staff privileges to the plaintiff physicians and dentists. The second would halt discrimination against Negro patients. In addition, the court was asked to declare the "separate but equal" provision of the Hill-Burton Act and the accompanying Public Health Service Regulation unconstitutional because they deprived the plaintiffs of rights, privileges, and immunities guaranteed by the due process and equal protection clauses of the Fourteenth Amendment and the due process clause of the Fifth Amendment.[23]

Long Hospital was given until April 2 and Cone until April 6 to file their answers to the complaint. On April 2, Charles E. Roth, attorney for Cone Hospital and Harold Bettis, and Thornton H. Brooks, attorney for Long Hospital and A. O. Smith, filed a motion to dismiss the suit because the court lacked jurisdiction over the subject matter, by reason of the fact that the suit was one "brought by individuals seeking redress for the alleged invasion of their civil rights by private corporations and other individuals."[24] The prohibitions against racial

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[22] Ibid., p. 17a.

[23] For the text of the provision and regulation in question see p. 19.

[24] Greenberg et al., "Appellants' Appendix," p. 19a.

discrimination stated in the fifth and fourteenth amendments are directed against federal and state governments--not private corporations or individuals.[25] In order to be within the jurisdiction of a federal court, the invasion of the plaintiffs' rights must be by government or its agent. Thus, the most important issue in the case was stated at its very outset. Could the actions of these two hospitals be labeled "state action"?

In reply, on May 4, 1962, the plaintiffs filed a motion for a preliminary injunction that would admit them immediately to the hospitals.[26] On the same day they moved for a summary judgment on the ground that no genuine issue of fact existed in the case.[27] Four days later, on May 8, 1962, the United States Department of Justice filed a motion to intervene on behalf of the plaintiffs because the constitutionality of an act of Congress that affected the public interest was drawn into question.[28]

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[25]In the case of the Fourteenth Amendment, this had been clearly states by the Supreme Court in the Civil Rights Cases of 1883. Congress had passed the Civil Rights Act of 1875 which made it a crime for any person to deny to any other person equal enjoyment of the accommodations, facilities, and privileges of inns, public transportation, and places of public amusement. The Court declared the law unconstitutional on the grounds that Congress had no power to pass a law enforcing the prohibitions of the Fourteenth Amendment against private persons, for that amendment says that no state shall deny to any person the equal protection of the laws, or deprive any person of life, liberty or property without due process of law. In the words of Justice Bradley, "It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the Amendment." The Civil Rights Cases, 109 U. S. 3 (1883).

[26]Greenberg et al., "Appellants' Appendix," p. 68a.

[27]Ibid., p. 72a.

[28]The right of the United States to intervene in such cases is provided by United States Code, Title 28, Sec. 2403.

The "separate but equal" clause of the Hill-Burton Act was a sore spot elsewhere, also. In April, 1962, the Federal Hospital Council approved a resolution calling for the revision of the "separate but equal" provision.[29] Several bills designed to end discrimination in the Hill-Burton program had already been introduced into Congress.[30] It was in the midst of these attempts to revise the law that the Justice Department moved to intervene in the Simkins case and eliminate the discriminatory provision by court action.

Action taken by the legislative branch would have a substantially different result from that of judicial action. Because Congress rarely acts retroactively, it could only prohibit discrimination in hospitals receiving Hill-Burton funds in the future. While a legislative change would act prospectively, a declaration in the courts that the provision was unconstitutional would have a retroactive effect. Hospitals that had received money under the Hill-Burton Act in 1947 would be just as subject to the consequences of the decision as those receiving funds after the decision.

President Kennedy stated that he thought the approach through the courts was tactically preferable to legislative one, and he directed the Department of Justice to associate itself with the plaintiffs in the Simkins case.[31] The change from legislative to judicial ground

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[29]Hospitals, American Hospital Association Journal, XXXVI (August, 1962), 96.

[30]For a discussion of the recent history of attempts to amend the Hill-Burton Act to eliminate discrimination in the program see Chapter VI.

[31]William M. Cobb, "John Fitzgerald Kennedy, 1919-1963," National Medical Association Journal, LVI (November, 1964), 2.

considerably changed the point in question. The issue was not whether the hospitals would continue to receive federal funds if they discriminated against Negroes: the issue was only whether the hospitals could discriminate.

On June 26, 1962, Chief Judge Edwin M. Stanley presided over a day-long hearing on the four motions that had been filed. He ruled in favor of federal intervention in the suit, but he denied the plaintiffs' motion for a temporary injunction. Rulings on the defendants' motion for dismissal and the plaintiffs' motion for a summary judgment were deferred until after July 31. Since both parties agreed that only legal issues were disputed, the court directed them to file their facts, conclusions based on the evidence, and any further briefs that either wished to submit by July 20. These were then to be exchanged and the parties given until July 31 to file any objections.

The Reaction

The suit was almost immediately recognized as one of potential significance, especially for racial integration of medical facilities. The Greensboro Record noted that the case "might have far reaching results in communities which have used federal funds under the Hill-Burton Act in construction of hospitals. Reportedly more than 2,000 hospitals in the South have made use of federal funds."[32] The Greensboro Daily News suggested "intelligent mediation" as an alternative to prolonged litigation and race bitterness.[33] It was also felt that the

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[32]February 12, 1962, p. 1.

[33]February 14, 1962, p. 8.

lawsuit came at an unfortunate time. It might jeopardize the L. Richardson fund-raising drive; and whatever happened in the case, there would still be a need for these additional hospital beds, since most Negroes would probably continue to prefer their own hospital.[34]

There was no attempt to reach a compromise agreement outside the courts, however. The potential effect of the lawsuit on a 100-bed addition to the Richardson Hospital was outweighed by its possible effect on some 6,000 hospitals throughout the United States. Litigation had begun.

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[34] Greensboro Daily News, May 10, 1962, p. 8.

CHAPTER III

THE DISTRICT COURT

Findings of Fact

All briefs and the responses to them were filed by July 30, 1962. On the basis of these submissions, the District Court made extensive "findings of fact."[1]

Cone Hospital was originally incorporated in 1911. There were ten original incorporators, all private citizens, who became its first Board of Trustees. The legislative charter, applied for in order to provide for a Board of Trustees with perpetual succession, was enacted in 1913. It established a board of fifteen members: three to be appointed by the Governor of North Carolina, one by the City Council of Greensboro, one by the Board of Commissioners of Guilford County, one by the Guilford County Medical Society, one by the Board of Commissioners of Watauga County, and the remaining eight by Mrs. Bertha L. Cone as long as she lived.[2] After the death of Mrs. Cone, the eight trustees appointed by her were to perpetuate themselves by election. In 1961,

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[1]In the discussion which follows I have relied heavily on the District Court decision, Simkins v. Cone Hospital, 211 F. Supp. 628 (M.D.N.C. 1962) which contains the facts of the case as well as the basic arguments of plaintiffs and defendants.

[2]Mrs. Bertha L. Cone, wife of Moses H. Cone, died in 1947. She was the founder and principal benefactor of the hospital.

the charter was amended to eliminate the appointment of one trustee by the Board of Commissioners of Watauga County, and to provide that the original appointee of that board also be perpetuated through election. Since 1911 the corporation had owned the real property on which the hospital was built, and its Board of Trustees had exclusive control over all real and personal property of the corporation as well as its institutional services and activities.

Two grants under the Hill-Burton Act had been approved for Cone Hospital, one in 1954, the other in 1960. The funds appropriated for Cone by the federal government ($1,269,950.00) amounted to approximately 15 per cent of the total construction costs of the two projects ($7,367,023.32).

Cone Hospital had permitted the Agricultural and Technical College of North Carolina (since 1954) and the Woman's College of the University of North Carolina (since 1957), both tax-supported state institutions, to use its facilities in the training of their nursing students. The student nurses carried out assignments under the supervision of their own teachers, not of the hospital staff. They did not replace any personnel on the staff, and the hospital had no priority in the employment of nurses graduating from either college. The hospital provided conference rooms for the use of the schools without charge and subsidized the students' meals and laundry service. Its connection with the Agricultural and Technical College program had cost it $3,337.59, which it paid from its own funds. To the nursing program of Woman's College, Cone had contributed $131,835.13, in addition to $10,500.00 given that institution for scholarship loans to student nurses. The plaintiffs and defendants

agreed that "the monetary value of the services rendered the hospital by the student nurses is not commensurate with the substantial contributions the hospital has made of both its funds and facilities to the furtherance of the nursing programs."[3]

Long Hospital, like Cone, was a non-profit corporation which owned the real property on which it was located. Its charter of corporation made its twelve-member Board of Trustees, all citizens of Greensboro, a self-perpetuating body. The Board of Trustees was vested with exclusive control over the real and personal property of the corporation and its institutional services and activities.

Three Hill-Burton grants (in June, 1959, April, 1961, and December, 1961) had been approved for Long Hospital. The sum of $1,948,800.00 had been appropriated for these projects, approximately 50 per cent of their total cost ($3,927,385.40).

Both defendant hospitals were exempt from ad valorem taxes assessed by the City of Greensboro and Guilford County and both were licensed by the State of North Carolina. Since the North Carolina State Plan (approved by the Surgeon General of the United States) had programmed separate hospital facilities for separate population groups in the Greensboro area, each hospital had received the grants, through the North Carolina Medical Care Commission, with the written understanding that admission to the proposed facilities might be denied because of

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[3] Simkins v. Cone Hospital, 211 F. Supp. 628 (M.D.N.C. 1962).

race, creed or color.[4]

There was no dispute between plaintiffs and defendants with regard to the facts of the case. Both parties admitted that the plaintiffs had sought admission to the facilities of the defendant hospitals and had been denied this because of their race. But what was the significance of the facts put before the court? Here the plaintiffs and defendants differed considerably.

Plaintiffs' Argument

State Action

The plaintiffs attempted to demonstrate that the defendants' relationships with government were sufficient to place them under the restraints of the fifth and fourteenth amendments to the Constitution. Five points of contact with government, two of which did not apply to Long Hospital, were discussed.

Since six members of the Cone Hospital Board of Trustees were appointed by public officials or agencies, the plaintiffs argued that the private character of the institution was affected. They supported their position by reference to the decision in Commonwealth of Pennsylvania v. Board of Directors of City Trusts of City of Philadelphia, 353 U. S. 230 (1957). In that case, the Supreme Court held that discrimination against Negro applicants to Girard College, a trust which

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[4]In the 1954 application for a grant, Cone gave assurance that the hospital would be operated without discrimination because of race, creed or color, but in the later application it stated that the hospital had erroneously represented that the facilities would be operated without discrimination. A waiver of the nondiscrimination assurance was permitted.

was administered by a board of trustees created by the state legislature, was unconstitutional under the Fourteenth Amendment. Although the limitations put on the use of money placed in the trust (a school for poor, male, white orphans) had been stipulated by the individual establishing it, the fact that it was administered by a state agency brought the college under the prohibitions of the Fourteenth Amendment. Thus, the Supreme Court had held that the state could not participate in the administration of a private trust which drew racial distinctions, and the plaintiffs alleged that the state, through the appointment of six trustees, was participating in the administration of Cone Hospital.

The second point of government contact which applied only to Cone was its involvement in the nursing programs of two state-supported institutions. In their complaint, the plaintiffs alleged that the state was aiding the hospital: "In the course of said training these student nurses substantially contribute, without charge to the hospital, valuable nursing services for which it would otherwise pay substantial sums."[5] In reply, Cone Hospital demonstrated that the contributions made by the student nurses were outweighed by the aid that the hospital gave the nursing programs.[6] Plaintiffs then altered their original argument and held that because Cone assisted the state, it was carrying on the work of the state and therefore became its instrument.

The third and fourth connections with government, exemption from ad valorem taxes and licensure by the state of North Carolina, applied

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[5]Greenberg et al., "Appellants' Appendix," p. 12a.

[6]Ibid., pp. 55a-59a.

to both hospitals. Although each contact was not in itself sufficient to satisfy the state action requirement, both were argued to be additional significant factors in the totality of state involvement with the two hospitals.

The last nexus with government, participation in the Hill-Burton program, the plaintiffs considered the most important. The federal funds allocated to the hospitals and the requirement for plans and specifications to meet the standards established for hospital construction and equipment by the Public Health Service Regulations were important involvements with government, they argued. In addition, the federal funds were allocated to hospitals through a state agency, the North Carolina Medical Care Commission, which had the responsibility of planning for state-wide medical facilities. These conditions, they felt, should add considerable weight on the scale of state action.

The application of constitutional restraints to the defendants, however, did not depend on any one of these aspects of government involvement. The plaintiffs argued that government action had to be viewed as a totality. They referred to Burton v. Wilmington Parking Authority, 365 U. S. 715 (1961) to support their position. In Burton the Court discussed the contacts that a restaurant had with government and concluded: "Addition of all these activities, . . . together with the obvious fact that the restaurant is operated as an integral part of a public building devoted to a public parking service, indicates that degree of state participation and involvement in discriminatory action which it was the design of the Fourteenth Amendment to condemn." As

in the Burton case, plaintiffs reasoned, the sum of the connections between the state and the two hospitals was sufficient to satisfy the state action requirement of the Fourteenth Amendment.

The Question of Constitutionality

If the hospitals were subject to constitutional limitations, then, the plaintiffs asserted, the court must declare the "separate but equal" provision of the Hill-Burton Act unconstitutional for it was the law which sanctioned the defendants' conduct. The Hill-Burton Act and the federal regulation in question authorized the construction of separate facilities for separate population groups. Because separate facilities had, since 1954, been held a violation of the fourteenth and fifth amendments, Congress's authorization of such practices, the plaintiffs felt, was clearly contrary to the Constitution. In the words of Burke Marshall, "What the Constitution forbids, Congress may not sanction. It is clear, therefore, that Congress may not enact a statute authorizing a hospital construction program based on a separate-but-equal formula, and a state may not administer such a program."[7]

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[7]Burke Marshall et al., "Memorandum of the United States: In the United States District Court for the Middle District of North Carolina, Greensboro Division, G. C. Simkins, Jr., et al. v. Moses H. Cone Memorial Hospital et al.," (1962), p. 21. Hereafter cited as "Memorandum of the United States: In the United States District Court."

Defendants' Position

A Private Institution

In the defendants' view, the hospitals were private corporations and therefore able to discriminate if they chose. They dealt with each point the plaintiffs had brought up and concluded that if no single one of the contacts with government were sufficient to render the hospitals instruments of the state (and plaintiffs did not argue that they were), then the same would be true with respect to the total of such contacts. In addition, the courts had already ruled in Eaton v. James Walker Memorial Hospital, a very similar case, which should control the instant case.[8]

In Eaton, suit was brought against the Board of Managers of James Walker Memorial Hospital for racial discrimination. The land on which the hospital was built was conveyed to it by the City of Wilmington and New Hanover County to be held in trust by the hospital so long as it was maintained for the benefit of the city and county. In case of disuse or abandonment, the property was to revert to the city and county. A majority of the original members of the hospital's self-perpetuating Board of Managers was appointed by public authorities. Prior to 1951, the city and county made direct annual contributions for the support of the hospital. Walker Hospital had also received federal funds for expansion and maintenance of the hospital under the Defense Public Works Act of 1940. It was licensed by the state of North Carolina and was exempt from ad valorem taxes. The courts found no state action and the case was dismissed for want of jurisdiction.

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[8]Eaton v. Board of Managers of James Walker Memorial Hospital, 261 F. 2d 521 (4th Cir. 1958), cert. denied, 395 U. S. 984 (1959).

Except for the connection of Moses H. Cone Memorial Hospital with the nursing programs of the two colleges, there was no point of contact between government and Cone and Long hospitals that was not in the Eaton case. Moreover, there were a number of contacts present in Eaton that were not found in the Simkins case--the possibility of reverter, city and county contributions, and a majority of the Board of Managers appointed by public authority. Therefore, defendants reasoned, if the Walker Hospital were a private institution, did it not logically follow that Cone and Long were also?

The Hill-Burton Issue

The defendants maintained that the constitutionality of the "separate but equal" provisions of the Hill-Burton Act and federal regulations was completely irrelevant. The hospitals did not rely on these provisions to carry on discrimination against Negroes. Discrimination was their prerogative because they were private corporations--they did not assume this right by virtue of permission by the government. Moreover, they argued, the issue of constitutionality would be irrelevant even if the hospitals were instrumentalities of government because they would then be subject to the constitutional amendments forbidding discrimination and the Hill-Burton Act could neither authorize nor excuse violations of these amendments.

The Decision

After he heard the arguments, Judge Stanley stated that the " . . . sole question for determination is whether the defendants have

been shown to be so impressed with a public interest as to render them instrumentalities of government, and thus within the reach of the Fifth and Fourteenth Amendments to the Constitution of the United States."[9] To determine whether the hospitals were public corporations in the constitutional sense, the court examined each of the aspects of government involvement the plaintiffs had presented.

Stanley quickly disposed of the matter of the appointment of the Cone Hospital Board of Trustees. Six members of the fifteen-member board were appointed by public officers or agencies. Since these members were clearly in a minority on the board, the private trustees were in control of the corporation. It is control by a public authority, not merely the appointment of trustees by public authority, Judge Stanley held, that makes a corporation public.[10] In reply to the plaintiffs' reliance on Commonwealth of Pennsylvania v. Board of Directors of City Trusts of City of Philadelphia, he cited the fact that the Board of Directors was a body created by the Pennsylvania Legislature, thus a state agency, and concluded, "No case has been cited or found which

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[9] Simkins v. Cone Hospital, 211 F. Supp. 628 (M.D.N.C. 1962).

[10] Stanley supported his opinion by reference to Norris v. Mayor and City Council of Baltimore, 78 F. Supp. 451 (D. Md. 1948) in which the court decided "The legal test between a private and public corporation is whether the corporation is subject to control by public authority, state or municipal. To make a corporation public, its manager, trustees, or directors must be not only appointed by public authority but subject to its control." He also quoted the concurring opinion in Dartmouth College v. Woodward, 17 U. S. (4 Wheat.) 518 (1819): "When the corporation is said, at the bar, to be public, it is not merely meant that the whole community may be the proper objects of its bounty, but that the government have the sole right, as trustees of the public interest, to regulate, control and direct the corporation, and its funds and its franchises, at its own good will and pleasure."

holds that the appointment of a minority of trustees by public officers or agencies converts the character of the corporation from private to public."[11] The first point of government contact with Cone Hospital was thus ruled insignificant.

Cone Hospital's participation in the student nursing programs of two state-supported colleges was deemed purely voluntary. Stanley answered the plaintiff's argument that by the giving, rather than receiving, of assistance to the state Cone Hospital had become its agent by again bringing up the question of control. "There is no suggestion that either educational institution exercises any control whatever over the hospital, or attempts to direct any of its policies."[12] Therefore, the involvement in the student nursing program in no way affected the character of the hospital.

It was concluded that the exemption from ad valorem taxes was not a factor to be considered. Although both hospitals were exempt, the same was true of the property owned by other private, religious, educational, and charitable organizations. "Surely it cannot be said that a purely local church, school or hospital becomes an instrumentality of the state, and subject to its control, by simply having its property exempt from ad valorem taxes. No authority has been cited for such a proposition."[13]

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[11] Simkins v. Cone Hospital, 211 F. Supp. 628 (M.D.N.C. 1962).

[12] Ibid.

[13] Ibid.

The licensing of the defendant hospitals was held to be similar to the licensing of restaurants. In Williams v. Howard Johnson's Restaurant the court had decided that the restaurant was not involved in state action merely because it was licensed by the state:

> The statute [restaurant licensing law] is obviously designed to protect the health of the community but it does not authorize state officials to control the management of the business or to dictate what persons shall be served.[14]

Stanley reasoned that, like licenses issued to restaurants, the hospital licensing statutes and regulations were " . . . designed to protect the health of persons served by the facility, and do not authorize any public officials to exert any control whatever over management of the business of the hospital, or to dictate what persons shall be served by the facility."[15] He went on to say that members of practically all professions and most businesses were required to be licensed by the state, and to hold that all these persons and businesses were therefore agents of the state would " . . . go completely beyond anything that has ever been suggested by the courts." And so the fourth point of government contact with the hospitals was also ruled insignificant.

Finally, there remained to be considered the hospitals' receipt of federal funds under the Hill-Burton Act. In Judge Stanley's opinion, the funds should be considered unrestricted grants because neither hospital relied on the provisions of the Act or their agreement with the North Carolina Medical Care Commission to carry on discriminatory

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[14] Williams v. Howard Johnson's Restaurant, 268 F. 2d 845 (4th Cir. 1959), quoted by Judge Stanley.

[15] Simkins v. Cone Hospital, 211 F. Supp. 628 (M.D.N.C. 1962).

policies. Nor were the requirements and standards for the construction and equipment of hospitals to be treated as elements of government control over the hospitals. The mere contribution of money by the government was also held insufficient to render the hospitals subject to the restrictions of the fourteenth and fifth amendments.[16] Judge Stanley combined all of these points and concluded:

> Since no state or federal agency has the right to exercise any supervision or control over the operation of either hospital by virtue of their use of Hill-Burton funds, other than factors relating to the sound construction and equipment of the facilities, and inspections to insure the maintenance of proper health standards, and since control, rather than contribution, is the decisive factor in determining the public character of a corporation, it necessarily follows that the receipt of unrestricted Hill-Burton funds by the defendant hospitals in no way transforms the hospitals into public agencies.[17]

Even at this point, however, the decision could have still been in favor of the plaintiffs. They had not contended that each contact with government, taken individually, would change the character of the

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[16]Stanley referred to two cases to support this opinion. In Eaton, the land on which Walker Hospital was built had been donated by the city and county governments and annual donations were made to the hospital by both governmental bodies for many years. The court had held these contributions not sufficient to make the hospital subject to the prohibitions of the Fourteenth Amendment. In Khoury v. Community Memorial Hospital, 203 Va. 236, 123 S. E. 2d 533 (1962), the hospital being sued had received more than half its construction funds from the federal government under the Hill-Burton Act and the remainder from the Commonwealth of Virginia and local subscriptions. The court held that the hospital fell within the definition of a private corporation because it was not owned by the federal or state government (even though they made its construction possible by the contribution of funds), and its officers were not representatives of government nor were they appointed by representatives of government.

[17]Simkins v. Cone Hospital, 211 F. Supp. 628 (M.D.N.C. 1962).

hospitals from private to public, but, rather, that it was the sum of these contacts--the totality of government involvement--that was important. Stanley dismissed the Burton case, on which they relied for this theory, as a "leasing case," and said, " . . . if neither of the contacts they have with a public agency makes them an instrumentality of government, the same result would necessarily follow with respect to the total of such contacts. In other words . . . zero multiplied by any number would still equal zero."[18]

Neither hospital then, the court decided, was sufficiently involved with government to lose its private character. But what of the constitutionality of the "separate but equal" provision of the Hill-Burton Act? Were the plaintiffs due the declaratory relief they sought? No, ruled the court. The plaintiffs did not have standing to challenge the Hill-Burton Act. The law did not deprive them of their constitutional rights because the defendants did not claim any right or privilege under its provisions. Since courts avoid rendering a decision on a constitutional question unless it is absolutely necessary to the disposition of the case, the Hill-Burton Act, ruled Judge Stanley, was not at issue.

The motion for summary judgment by the plaintiffs was denied and the defendants' motion to dismiss the complaint for lack of jurisdiction was granted.

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[18] Ibid.

The Aftermath

On December 8, 1962, it was announced that the December 5 ruling of the District Court would be appealed.[19] Two weeks after the decision in its favor, on December 19, the Cone Hospital Board of Trustees announced that it had decided to consider applications from Negro physicians and dentists on the same basis as other applicants and had sent letters notifying the Negro professionals of its decision.[20] The policy with respect to Negro patients, however, was not altered. Long Hospital made no change in its racial policies. Despite the gesture, notices of appeal by the NAACP lawyers and the U. S. Department of Justice were filed Janaury 4 and January 11, 1963, respectively.

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[19] Greensboro Daily News, December 8, 1962, p. 7.

[20] Greensboro Record, December 19, 1962, p. 1.

CHAPTER IV

TWICE APPEALED

The Fourth Circuit Court of Appeals

On April 1, 1963, the arguments of appellants and appellees were heard by the United States Court of Appeals for the Fourth Circuit. Because of the importance of the questions involved in the case, Chief Judge Sobeloff and Circuit Judges Haynsworth, Boreman, Bryan, and Bell heard the appeal sitting en banc.[1] The case was decided on November 1, 1963.

The Majority Opinion

Chief Judge Sobeloff, writing the opinion for the majority, began by stating that the lower court had erred in its structure of the essential

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[1]Full names of the judges are: Simon E. Sobeloff, Clement F. Haynsworth, Jr., Herbert S. Boreman, Albert V. Bryan, J. Spencer Bell. There are eleven United States Courts of Appeal, one for each of the ten numbered circuits and one for the District of Columbia. The number of judges appointed to each court varies from three to nine, and usually cases are heard by a three-judge division of the court. However, a majority of the active circuit judges in a circuit may vote to order a hearing before the court en banc. Rule 35, Federal Rules of Appellate Procedure specifies that such a hearing will not ordinarily be ordered except "(1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance." In U. S., Federal Rules of Civil Procedure and Federal Rules of Appellate Procedure (St. Paul, Minn.: West Publishing Co., 1968). The en banc procedure has the advantage of avoiding conflicting views within a circuit and tends to make the court of appeal's decision final.

question:

> In the first place we would formulate the initial question differently to avoid the erroneous view that for an otherwise private body to be subject to the antidiscrimination requirements of the Fifth and the Fourteenth Amendments it must actually be "render /ed an/ instrumentalit/y/ of government * * *." In our view the initial question is, rather, whether the state or the federal government, or both, have become so involved in the conduct of these otherwise private bodies that their activities are also the activities of these governments and performed under their aegis without the private body necessarily becoming either their instrumentality or their agent in a strict sense.[2]

Sobeloff ruled that Burton, as the plaintiff-appellants had interpreted that decision, was controlling in this case. While he accepted the appellants' theory, however, he did not accept the totality of government involvements that they suggested. Instead, only one of the five points of government contact presented by the appellants was used to establish "state action."

Sobeloff found the necessary degree of state involvement to be present as a result of the hospitals' participation in the Hill-Burton program. This program, he held, subjected the defendant-appellees to an "elaborate and intricate pattern of governmental regulations." Four categories of regulations were deemed most important. First, the Hill-Burton Act provided that if within twenty years after completion of a project the hospital changed status, the United States could recover a proportionate share of its grant to that hospital.[3] Second, hospitals

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[2]Simkins v. Cone Hospital, 323 F. 2d 959 (4th Cir. 1963).

[3]This provision could be invoked if the hospital ceased to be "nonprofit" or if it were sold to anyone not qualified to apply for aid under the Hill-Burton Act.

receiving assistance were required to render hospital services in accordance to specified minimum standards. No federal grants could be allocated to any state which did not enact legislation requiring compliance with these standards.[4] Third, the Hill-Burton Act provided for federal decision as to the number of hospital beds and facilities necessary to provide adequate service in a state, for the method of distribution of facilities in a state, and for the general way in which a state agency should determine the priority of projects. Fourth, the state was required to submit a state plan of hospital construction which had to meet the requirements of nondiscrimination and furnishing hospital services to people unable to pay for them.

As a result of these involvements with government (state and federal), the majority concluded that, just as the Supreme Court in Burton attached major significance to the fact that the restaurant was operated as an integral part of a public building devoted to a public parking service, so also " . . . we find it significant here that the defendant hospitals operate as integral parts of comprehensive joint or intermeshing state and federal plans or programs designed to effect a proper allocation of available medical and hospital resources for . . . promotion and maintenance of public health."[5]

Sobeloff added that not every endowment by federal or state government automatically involves the beneficiary in "state action" nor was it

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[4]North Carolina, to meet these requirements, enacted a Hospital Licensing Act in 1947 which provided in detail for the management of hospitals. All hospitals in the state were required to be licensed, however, not just those receiving federal funds.

[5]Simkins v. Cone Hospital, 323 F. 2d 959 (4th Cir. 1963).

necessary to delineate the legal rule as it might operate in any other case. "Our concern is with the Hill-Burton program, and examination of its functioning leads to the conclusion that we have state action here."[6]

The court held that the plaintiff-appellants did have standing to challenge the Hill-Burton Act and asserted "To make any relief effective it becomes necessary to pass upon the validity of the statute and the regulation, because they contain an affirmative sanction of the unconstitutional practice."[7] Thus, the provisions of the Hill-Burton Act and federal regulation in question were declared unconstitutional under the due process clause of the Fifth Amendment and the equal protection clause of the Fourteenth Amendment. The decision of the District Court was reversed and the case was remanded with directions to grant the requested injunctive relief.

The Dissent

Two judges disagreed with the majority. Circuit Judge Haynsworth wrote a dissenting opinion in which he was joined by Judge Boreman. The dissenters held that the majority had distorted the purposes and actual operation of the Hill-Burton Act. They noted that the law itself provided that nothing in it should be construed as giving any federal officer or employee any right of supervision or control over any hospital receiving grants under the act. The power of the Surgeon General to

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[6]Ibid.

[7]Ibid.

approve or disapprove state plans and applications was the only exception. Since this did not result in a continuing right of control by the Surgeon General, Haynsworth reasoned, "subsequent operation of a hospital which had received a grant in aid of a construction program was not to be federal action."[8]

Nor did the state of North Carolina exercise control over the hospitals. In 1946 the state's General Assembly enacted a statute authorizing the North Carolina Medical Care Commission to survey and determine the need for hospital facilities. This commission was merely empowered to perform administrative duties, Haynsworth stated, not to exercise regulatory or supervisory functions over the operation of private nonprofit hospitals. In his opinion, the Hill-Burton Act, and the North Carolina statute related to it, simply provided the machinery by which a hospital might apply for a grant in aid of construction.

The government's standards of maintenance and operation and its right to regain part of a grant if the hospital should change status (in the manner prescribed) within twenty years were, in Haynsworth's view, " . . . no more than a necessary provision for the protection of public moneys against unreasonable profligacy."[9] Any government subsidization carries with it certain terms and he added, "The truth is plain. This scheme for grants in aid to hospitals differs neither in kind nor

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[8] Ibid.

[9] Ibid.

degree from any other provision for grants in aid of private endeavor."[10]

The state plan, in the dissenters' opinion, was " . . . no more than a survey of existing facilities to be utilized as a basis for judgment as to the relative need of such additional facilities as might be proposed by local governmental bodies or private nonprofit corporations or groups."[11] The two hospitals played the same role before they received the grants as they did afterward. Their facilities were taken into account and were relevant to the determination of the need of additional facilities in their area before they received the grants. Thus, whether the improvements had been made with or without government aid, they would have affected the state plan in the same way. Haynsworth concluded, "If then, the operation of these hospitals was not state action before their receipt of the grants in aid, a determination that their operation is now state action depends wholly upon the fact that they received the grants in aid."[12] The dissenters added that the proposals made in Congress to eliminate discrimination in the Hill-Burton program gave support to their view that Congress had no idea that grants through the program would render the recipient private hospitals subject to the fifth and fourteenth amendments. The legislative branch, not the judicial, they felt, was the proper arena for the resolution of the question.

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[10] Ibid.

[11] Ibid.

[12] Ibid.

The United States Supreme Court

The issues in this case appeared to be debatable--the District Court rendered a judgment in favor of the hospitals, and a three-to-two decision, as was the Court of Appeals', is usually considered weak. So on January 20, 1964, the defendant-appellees petitioned the Supreme Court for a writ of certiorari to the Court of Appeals for the Fourth Circuit.

Roth and Brooks, lawyers for the two hospitals and their administrators, cited a variety of reasons for granting the writ. They accepted Judge Haynsworth's reasoning and argued, "The present case would appear to be the first in which it has ever been held that the mere contribution of Federal funds to a private agency is sufficient to characterize the subsequent operations of the agency as State action."[13] Not only was the decision unprecedented, in their opinion; its implications were "staggering." Although the Circuit Court did not formulate the precise rule it followed, and stated that not every contribution from government automatically involves the recipient in "state action," the petitioners argued, " . . . it is equally true that under the decision of the majority every subvention by the federal or state government is automatically suspect until the matter is litigated and the innocence of the grant established--perhaps, as here, long after it was made."[14]

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[13]Charles E. Roth and Thornton H. Brooks, "In the Supreme Court of the United States, October Term, 1963, The Moses H. Cone Memorial Hospital et al., Petitioners v. G. C. Simkins et al. and United States of America, Intervenor, Respondents, Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit," (1964), p. 6. Hereafter cited as, "In the Supreme Court: Petition for a Writ of Certiorari."

[14]Ibid., p. 8.

They continued, " . . . the uncertainty would surely pervade the whole range of government financial aid . . . and it would apply not alone to discrimination but inevitably to all other constitutional safeguards."[15]

Finally, petitioners re-stated the position they had maintained throughout the controversy with regard to the constitutionality of the Hill-Burton Act. The hospitals claimed no right to discriminate under this law--discrimination was their right as private institutions. Since the plaintiffs' rights had not been violated as a result of the law, but by private institutions, the question of constitutionality was irrelevant. Even if the constitutionality of the Hill-Burton Act were properly before the Court, the petitioners added, it should not be a foregone conclusion that it was invalid.[16] They noted that the Assistant Attorney General had stated that the government could give away money and leave the recipient free to discriminate or not discriminate[17] and added, " . . . the only complaint against the waiver provisions is that they do not affirmatively require an otherwise private institution to desegregate, but merely leave its privacy intact. It is difficult to believe--particularly in the light of the concession by the Attorney General--that this is unconstitutional; . . ."[18]

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[15] Ibid., pp. 8-9.

[16] There had been no previous attempt to defend the constitutionality of the "separate but equal" provision of the Hill-Burton Act.

[17] Burke Marshall et al., "Brief for Appellant, United States of America in the United States Court of Appeals for the Fourth Circuit, G. C. Simkins, Jr., et al., and United States of America, Appellants, v. Moses H. Cone Memorial Hospital, a Corporation et al., Appellees, On Appeal from the United States District Court for the Middle District of North Carolina," (Washington: U. S. Government Printing Office, 1963), p. 39. Hereafter cited as "Brief for United States: Fourth Circuit Court of Appeals."

[18] Roth and Brooks, "In the Supreme Court: Petition for a Writ of Certiorari," p. 17.

The Department of Justice also submitted a brief to the Supreme Court. Archibald Cox, Solicitor General, and Burke Marshall, Assistant Attorney General, held that the decision of the Appeals Court was correct in both of its aspects. It was not solely because the hospitals received federal funds that they were being held subject to constitutional restraints. The hospitals were performing a function of the state--a function that the state had assumed through its participation in the Hill-Burton program. There were many elements of government involvement with the hospitals in this case, they argued.[19]

With regard to the constitutionality of the Hill-Burton Act, the Department of Justice reasoned:

> If the discrimination is constitutionally impermissible, the statute which authorized both federal and state governments to sanction and participate in such discrimination is, to that extent, invalid. Had the court of appeals decided this case against petitioners without passing upon the validity of the Hill-Burton proviso it would, in effect, have required petitioners to cease engaging in activities which are validated by federal law.[20]

On March 2, 1964, the United States Supreme Court denied the petition for a writ of certiorari to the Fourth Circuit Court of Appeals.[21] The

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[19]Archibald Cox et al., "Memorandum for the United States: In the Supreme Court of the United States, October Term, 1963, Moses H. Cone Memorial Hospital et al., Petitioners, v. G. C. Simkins et al. and United States of America, On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit," (Washington: U. S. Government Printing Office, 1964), p. 4. Hereafter cited as "In the Supreme Court: Memorandum for the United States."

[20]Ibid., p. 5.

[21]Simkins v. Cone Hospital, 376 U. S. 938 (1964).

Circuit Court's decision was thus, in effect, affirmed, and an order enjoining the defendant hospitals from discriminating on the basis of race was entered April 16, 1964, by Judge Stanley in the District Court for the Middle District of North Carolina.

CHAPTER V

STATE ACTION

There is no precise formula for recognition of state responsibility under the due process and equal protection clauses of the Fourteenth Amendment.[1] When a state through legislative or judicial action directly interferes with the constitutional rights of individuals, the applicability of the Fourteenth Amendment is easily established. When a seemingly private institution abridges individual rights, however, state action is not so easily found. In 1883 the Supreme Court held in the Civil Rights Cases that private conduct was not within the scope of the Fourteenth Amendment. Since that time, however, the courts have increasingly found the Fourteenth Amendment to apply in cases where neither state law nor state court decision was involved. Where does the line between private conduct and state action fall?

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[1]The Fifth Amendment applies only to action of the federal government and the Fourteenth Amendment to action of state governments. Although the Court in Simkins invoked both the fifth and fourteenth amendments to find "state action" in the broad sense (including federal action), the concept of what constitutes state action has been developed primarily through the Fourteenth Amendment rather than the Fifth Amendment. For this reason, it is with the Fourteenth Amendment that this chapter is concerned, although the tests for finding state action which have developed are applicable to the federal as well as the state government.

An informative discussion of the problems involved in invoking the Fourteenth Amendment may be found in "State Action: A Study of Requirements Under the Fourteenth Amendment," The Race Relations Law Reporter, I (1956), 613-637.

Before the Simkins decision, the courts had adopted several tests to determine the line between private and state action and had established several categories of private institutions whose actions were subject to the prohibitions of the Fourteenth Amendment.[2] In the Simkins case, the courts were urged to accept five different theories of state action as the basis on which to make a decision. The final choice in this matter considerably altered the legal definitions of private conduct and state action.

The Control Test

Because the Fourteenth Amendment does not apply to private actions, a logical approach to the problem in Simkins might be to determine whether the hospitals were public or private institutions in the constitutional sense. This was the option accepted by Judge Stanley when he said that in order to determine the existence of state action " . . . it is necessary

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[2]In addition to those activities which could clearly be called state action, The Race Relations Law Reporter, I, 613-637, suggested several types of private action which might, under certain circumstances, fulfill the requirements for state action. State action might include private action resulting from a mandatory state statute, action of lessees from the state, action of private organizations receiving state aid, and action of a private organization performing a function of the state.

A more detailed discussion of the categories of private action subject to the Fourteenth Amendment is found in Moot Court Board of Stanford University School of Law, "Bench Memorandum for Stanford Moot Court Sitting as the Supreme Court of the United States in the Case of Moses H. Cone Memorial Hospital, Appellant v. G. C. Simkins, Jr., Appellee," prepared for use in the Twelfth Annual Marion Rice Kirkwood Competition, February 5, 1964 (mimeographed, 1964), pp. 1-8. The bench memorandum suggested several categories: the actions of a private organization which is controlled by the state, an organization performing a function of the state, one serving the public (if franchised by the state or a lessee of the state), and the actions, possibly, of a private organization which is involved with government to a significant extent.

to examine the various aspects of governmental involvement which the plaintiffs contend add up to make the defendant hospitals public corporations in the constitutional sense."[3] He agreed with the defendants that the decisive factor in such a determination was government control.

This test for distinguishing between public and private institutions was stated as early as 1819 when Justice Story, concurring in Dartmouth College v. Woodward, 17 U. S. (4 Wheat.) 518 (1819) wrote:

> When the corporation is said, at the bar, to be public it is not merely meant that the whole community may be the proper objects of its bounty, but that the government have the sole right, as trustees of the public interest, to regulate, control and direct the corporation, and its funds and its franchises, at its own good will and pleasure.

Since that time the courts have used the same test a number of times to determine the existence of state action in Fourteenth Amendment cases. In Norris v. Mayor and City Council, the court upheld an art school's denial of admission to a Negro applicant saying "The legal test between a private and public corporation is whether the corporation is subject to control by public authority, state or municipal."[4] The court applied the control test in Williams v. Howard Johnson's Restaurant to find that restaurant free of constitutional restraints and ruled that the restaurant licensing law " . . . is designed to protect the health of the community but it does not authorize state officials to control the management of the business or to dictate what persons shall be served."[5] And in the

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[3] Simkins v. Cone Hospital, 211 F. Supp. 628 (M.D.N.C. 1962).

[4] 78 F. Supp. 451 (D.Md. 1948).

[5] 268 F. 2d 845 (4th Cir. 1959).

case of Eaton v. Board of Managers of James Walker Memorial Hospital, the court decided the Fourteenth Amendment did not apply to Walker Hospital because " . . . the hospital was not an instrumentality of the State but a corporation managed and operated by an independent board free from State control."[6]

When they argued before the Circuit Court, the plaintiffs partially accepted the view of the defendants and the lower court with regard to control. They submitted seven categories of federal and state controls over the hospitals: construction contracts, details of hospital construction and equipment, future operation and status of hospitals, details of hospital maintenance and operation, size and distribution of facilities, rights of project applicants and state agencies, and racial discrimination.[7]

Most of these controls, however, did not really touch the actual management of the hospitals. The construction requirements have nothing to do with the operation of the hospital and may be considered necessary conditions of the grant to prevent wasting money on buildings or equipment that might collapse in a few years. Since Congress could not make unlimited appropriations for projects it was necessary to establish some plan of priority for the distribution and size of projects. Neither does the right to a fair hearing before the state agency of a dissatisfied

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[6]261 F. 2d 521 (4th Cir. 1958).

[7]Jack Greenberg et al., "In the United States Court of Appeals for the Fourth Circuit, G. C. Simkins, Jr., et al., and United States of America, Appellants v. Moses H. Cone Memorial Hospital, a Corporation, et al., Appellees, On Appeal from the United States District Court for the Middle District of North Carolina: Brief of Appellants G. C. Simkins, Jr., et al.," (New York: Allied Printing, 1963), pp. 12-18. Hereafter cited as "Brief of G. C. Simkins."

project applicant, nor the right of a state agency to a review of the Surgeon General's decision by the federal courts affect the management of a hospital receiving Hill-Burton funds.

Several of the regulations listed could be considered controls over management of the hospitals. If a hospital were sold to anyone not qualified to file an application under the Hill-Burton Act, or if it ceased to be nonprofit within twenty years after the completion of a project, the federal government could recover a share of its grant to that hospital. The hospitals were also required to submit proposed budgets to assure their ability to pay the prevailing rates of wages and to maintain and operate the hospital for a two-year period after completion of a project. The states participating in the Hill-Burton program were required to enact laws which established state standards for operation and maintenance of hospitals and, in accordance, North Carolina passed a hospital licensing law in 1947. In order to be licensed to operate, a hospital must meet the minimum requirements set forth by the state law.

Finally, government regulation of racial discrimination might be considered a control over the hospitals' day-to-day operation. If a hospital chose to be a nondiscriminatory facility, control could be exerted by the government over the admissions policies of that hospital. If, however, a hospital chose to be a "separate but equal" institution, there would be no government regulation of its admission policies. Thus, in the case of Cone and Long, both "separate but equal" institutions,

this could not be considered a control over their policies.[8]

Even in the case of these regulations which did affect the hospitals' actual operation, however, it could not be said that government had " . . . the sole right . . . to regulate, control and direct the corporation, and its funds and its franchises, at its own good will and pleasure." On the basis of the control test, at least applied in its strictest sense, the hospitals could only be declared private institutions.

The judiciary, however, was not bound by this approach. Although semantic differences often seem unimportant, the defendants erred when they said:

> The plaintiffs still suggest in this Court that our question is "Whether the appellees' contacts with government are sufficient to place them under the restraints of the Fifth and Fourteenth Amendments against racial discrimination." This may seem to the plaintiffs a more euphemistic inquiry than whether the defendant hospitals are "public corporations" or even "public corporations in the constitutional sense"— but no amount of euphemism can conceal the ultimate spade. It is the same question still-- . . .[9]

It was not the same question still: although the control test was the established one for determining whether a corporation was public or private, it was not the only test available for finding state action.

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[8]Whether this provision is constitutional is not at issue here, only whether this provision grants the government some control over the hospitals. That this was not a control in this case is exemplified by the fact that Cone, a "separate but equal" hospital, did in fact admit Negroes.

[9]Herbert S. Falk and Charles E. Roth, "In the United States Court of Appeals for the Fourth Circuit, G. C. Simkins, Jr., et al., and United States of America, Appellants v. Moses H. Cone Memorial Hospital, a corporation, et al., Appellees: Brief and Appendix of Defendants-Appellees the Moses H. Cone Memorial Hospital and Harold Bettis, its Director," (1963), p. 5-6. Hereafter cited as "Brief of Cone Hospital."

Affection With A Public Interest

An alternative to the control theory is the theory that institutions which are of a public nature, which affect the community at large and operate for the benefit of the general public, are subject to Fourteenth Amendment requirements. Although hospitals certainly fall into this category, merely being operated for the benefit of the public is not sufficient to place an institution under the Fourteenth Amendment. The courts have utilized this test for finding state action only when other conditions, such as a government lease or franchise, were present.[10]

Burke Marshall, the Assistant Attorney General, submitted a brief argument in this vein in the District Court.[11] He began by asserting that a hospital is decidedly an institution of a public nature and that "Courts have long recognized that restrictions properly could be placed on activities affected with a public interest."[12] He cited Munn v. Illinois, Nebbia v. New York, Marsh v. Alabama, and

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[10]In Boman v. Birmingham Transit Company, 280 F. 2d 531 (5th Cir. 1960), state action was found on the basis of affection with a public interest and a government franchise. In Derrington v. Plummer, 240 F. 2d 922 (5th Cir. 1956), cert. denied, 353 U. S. 924 (1957), a facility which was affected with a public interest and was located on property which it leased from the county government was held to be involved in state action.

[11]The major portion of the Department of Justice's argument was not based on the "affection with a public interest" theory, but on the "totality of government involvement" theory.

[12]Marshall et al., "Memorandum of the United States: In the United States District Court," p. 31.

Boman v. Birmingham Transit Company to support this statement.[13] The argument was concluded by reference to Justice Douglas' concurring opinion in Garner v. Louisiana, in which he stated that such restrictions (constitutional prohibitions against state governments) apply to retail establishments which operate under a permit from the municipal government.

Although Marshall did not develop his argument to the point of applying it to the hospitals in the Simkins case, Douglas' reasoning was clearly applicable to the defendant hospitals. In Douglas' view, licensure by government was the "something more" (comparable to a franchise or lease) which in conjunction with "affection with a public interest" was sufficient to find state action. In his concurring opinion he stated:

> The authority to license a business for public use is derived from the public. Negroes are as much a part of that public as are whites. A municipality granting a license to operate a business for the public represents

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[13]The Assistant Attorney General seemed to be saying that restrictions, be they constitutional restrictions or an exercise of a state's police power, can be placed on facilities affected with a public interest. He dealt, however, with the two different types of restrictions as if they were one. In both Munn v. Illinois, 94 U. S. 113 (1877) and Nebbia v. New York, 291 U. S. 502 (1934), the Court upheld state social legislation--regulations on private entities--because the institutions were affected with a public interest. In no case that concerned constitutional limitations, however, was state action found solely on the basis of affection with a public interest. In Marsh v. Alabama, 326 U. S. 501 (1946), there was more involved than affection with a public interest. In that case, a corporation which owned and governed a town was held to be violating First Amendment freedoms by refusing to permit the distribution of religious literature in that town. The state had permitted the company to assume a state function (governing a community) and had prosecuted under an anti-trespass statute the Jehovah's Witness that was attempting to distribute the literature. In Boman v. Birmingham Transit Company, 280 F. 2d 531 (5th Cir. 1960), state action was found not only because the facility was affected with a public interest, but also because it was franchised by the state.

> Negroes as well as all other races who live there. A license to establish a restaurant is a license to establish a public facility and necessarily imports, in law, equality of use for all members of the public. I see no way whereby licenses issued by a State to serve the public can be distinguished from leases of public facilities . . . for that end.[14]

Thus, were this reasoning accepted, the licenses under which Cone and Long hospitals operated would be the additional factor necessary to halt their policy of racial discrimination.

This concept of state action was discussed as a possible source of congressional power to pass the Civil Rights Act of 1964, but there were (and are) many problems inherent in the theory that institutions licensed by the state are subject to the Fourteenth Amendment. They are perhaps best summarized in this statement:

> It was soon discovered that this theory would catch many inedible fish and let many big ones get away--for example, it would reach fortune tellers and embalmers in many states, but not department stores or hotels in some states; it would create virtually insoluble difficulties with lawyers, doctors, motor vehicle operators, and others, not only under the equal protection clause but under other constitutional inhibitions; and it was immediately obvious that any State willing to give up its licensing program might substantially defeat legislation based on this theory of State action.[15]

A decision, therefore, based in part on state licensure of an institution might not only be easily circumvented but it might also give rise to a number of problems.

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[14]Garner v. State of Louisiana, 368 U. S. 175 (1961).

[15]Charles E. Roth, "Federal Legislative Authority," a paper read at the Institute on Practical Problems and Recent Developments in Constitutional Law of the North Carolina Bar Association, Duke University, The University of North Carolina, and Wake Forest College, February 12 and 13, 1965 (mimeographed), p. v-11.

An Essential Function of the State

A third approach to the problem in Simkins is based on the theory that when a private institution performs an essential state function or responsibility, it must comply with constitutional requirements just as would the state, had it performed the function. On several occasions the courts have utilized this theory to find state action. The Supreme Court ruled in Smith v. Allwright that the denial to a Negro of the right to vote in a primary held by the Democratic party in Texas was unconstitutional. The primary was a vital part of the election machinery of the state and, therefore, Texas had delegated a state function to the party by allowing it to determine qualified voters in the primaries.[16] The Terry v. Adams decision declared unconstitutional the exclusion of Negroes from the "private primaries" of the Jaybird party (an unofficial party whose nominees met no opposition in the Democratic primaries). The private political club played a vital role in the state's elections--it performed a function of the state--and its actions were subject to the Fifteenth Amendment in the same manner as were the state's actions.[17]

The area of voting rights is not the only one where private institutions or persons had assumed a duty of the state and been brought under the Constitution. The refusal of a private company-owned town to allow the distribution of religious literature within its premises was declared a violation of the First Amendment and Fourteenth Amendment. In Marsh v. Alabama, the Court said that the fact that the property where the deprivation of liberty took place was privately owned was " . . . not sufficient

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[16] 321 U. S. 649 (1944).

[17] 345 U. S. 461 (1953).

to justify the State's permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties and the enforcement of such restraint by application of a State statute."[18] The corporation had been delegated a state function and it therefore had the same responsibilities as the state with regard to that function.

It was this line of reasoning that the Department of Justice advocated in the Circuit Court. The applicability of the "essential function of the state" theory to the Simkins case had occurred to the Assistant Attorney General earlier, and he touched upon the subject in his argument in the District Court saying:

> Both governmental and non-profit hospitals serve as general community hospitals. Such "community hospitals have become essential, both to provide hospital service to the people of the community and to enable its physicians to practice good medicine." Hence non-profit hospitals perform a vital function which would otherwise have to be performed by the state. It is not, therefore, inappropriate to include such hospitals within the reach of the Fourteenth Amendment. Only recently a court suggested that schools and colleges, "no matter how 'private' they may claim to be," are so affected with the public interest as to be bound by the Fourteenth Amendment.[19]

The decision to which Marshall referred was Guillory v. Administrators of Tulane University, in which the court said:

> No one any longer doubts that education is a matter affected with the public interest. And this is true whether it is offered by a public or private institution. . . . Clearly, the administrators of a private college are performing a public function. They do the work of the state, often in the place of the state. Does it not follow that they stand in the state's shoes? And, if so, are they not then agents of the state, subject to the constitutional restraints on governmental action, . . .[20]

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[18] 326 U. S. 501 (1946).

[19] Marshall et al., "Memorandum of the United States: In the United States District Court," p. 33.

[20] Quoted by Marshall, Ibid., p. 34.

Marshall did not mention, however, that the court did not base its decision on this reasoning, nor that the decision was subsequently overruled.[21]

The major problem with such an approach in the Simkins case would seem to be the establishment of the fact that the provision of hospital facilities was an essential state function. As Judge Haynsworth pointed out in his dissenting opinion:

> . . . the statutes do not empower the Medical Care Commission to provide general hospital facilities in a locality in default of cooperative efforts by local governmental bodies or citizens for the provision of such facilities. The role of the Commission is strictly limited, as is the role of the United States, to providing grants in aid of local effort, and the Commission is empowered to do nothing in the absence of such local effort.[22]

It appeared that by participating in the Hill-Burton program a state did not assume an obligation to provide hospitals for the people of the state.

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[21]District Judge Wright held on March 28, 1962, that Tulane University could not discriminate against Negroes because the history of the school and an analysis of its state connections indicated to him that it was a state institution, not because it was a private school performing a function of the state. He granted the plaintiff's motion for summary judgment. Guillory v. Administrators of Tulane University, 203 F. Supp. 855 (E.D.La. 1962). The defendants filed motions for a new trial and a rehearing. In the rehearing on May 15, 1962, the court decided that there was still an issue of material fact in the case. The judgment of the court had been premised on the fact that Tulane was historically and legally a state school, a fact which was challenged. Only where there is no genuine issue as to any fact may a summary judgment be granted, thus the case was set for trial on the merits. Guillory v. Administrators of Tulane University, 207 F. Supp. 556 (E.D.La 1962). On December 5, 1962, it was decided that "There is insufficient state involvement in the operation of the Tulane University of Louisiana to bring it within the privileges and proscriptions of the Fourteenth Amendment to the United States Constitution." Guillory v. Administrators of Tulane University, 212 F. Supp. 674 (E.D.La. 1962).

[22]Simkins v. Cone Hospital, 323 F. 2d 959 (4th Cir. 1963).

Marshall avoided the obvious difficulties of proving that the actual provision of hospitals was a state duty by arguing that the function of the state was to plan for hospitals. The Department of Justice's argument began:

> Our position is based on the fact that the Hill-Burton system contemplates a State obligation to plan for facilities to provide adequate hospital service to all the people of the State. To the extent that this obligation is carried out by otherwise private institutions, these recipients of the federal grants are acting for the State and are therefore subject, in this respect, to the obligations imposed upon State agents and instrumentalities by the Fourteenth Amendment.[23]

In his argument, Marshall relied heavily on congressional intent in enacting the Hill-Burton Act and the requirement of a state plan by that law. "It was Congress' intention," he argued, "that the participating States plan for facilities to provide adequate hospital service to 'all the people' of the State . . . ."[24] The law required each state wishing to benefit from Hill-Burton funds to design a state plan for the provision of hospital facilities. The obligation was the state's, he stressed, " . . . and if, for example, the number of beds in non-profit hospitals appear to be inadequate to meet the needs, the State would undoubtedly have to plan for beds in governmental institutions to have a program meeting the requirements of the law."[25] "Accordingly," he reasoned, "when the State draws a non-State institution into the

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[23]Marshall et al., "Brief for United States: Fourth Circuit Court of Appeals," pp. 18-19.

[24]Ibid., p. 20.

[25]Ibid.

State plan, the latter performs one of the State's acknowledged functions."[26]

There were problems even with this view. The state allowances, or "requirements" as Marshall called them, were set forth in the Code of Federal Regulations. The number of beds considered necessary to provide adequate service were: for states having 12 or more people per square mile, 4.5 general hospital beds per thousand population; for states with a population under 12 and over 6 persons per square mile, 5 beds per thousand; and for states with fewer than 6 persons per square mile, 5.5 beds per thousand.[27] These, however, were not requirements that the state was obligated to meet, but goals. Indeed, they were actually allowances, for once an area was brought up to the standard considered adequate, no further Hill-Burton aid could be received in that area.[28] Further evidence that states did not have to plan for

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[26] Ibid.

[27] U. S., Code of Federal Regulations, Title 42, par. 53.11.

[28] The plaintiffs presented a new angle of the "essential function" theory by alleging that if North Carolina had decided to build public hospitals in the Greensboro area, Long and Cone would have been denied federal aid, and, on the other hand, the aid granted Cone and Long hospitals prohibits the construction (with the aid of Hill-Burton funds) of public hospitals, since the standards set up by the Code of Federal Regulations had been met in that area. Thus, they reasoned that the hospitals had " . . . become the chosen and exclusive instruments to carry out governmental objectives." Greenberg et al., "Brief of G. C. Simkins," p. 29. The problem with this idea still exists. If the hospitals had effected the improvements and additional beds without government aid, there would still be no Hill-Burton funds available for the development of public hospitals in that area.

additional beds in public institutions if the ones in private hospitals were not adequate to have a program meeting the "requirements" of the law is supplied by North Carolina's participation in the Hill-Burton program. North Carolina had been involved in the Hill-Burton program since 1947 and, as of 1961, it had not reached the goal specified in the Code of Federal Regulations. For a state with over 12 persons per square mile, 4.5 hospital beds were considered necessary per thousand people.[29] In 1947, North Carolina had 2.5 hospital beds per thousand, and, in 1961, it had 3.7 beds per thousand people.[30] This clearly indicates that, although the goals had been attained in some areas, in other areas they had not, and the state had not assumed the responsibility of providing or planning for the additional beds necessary to reach these goals.

Were hospitals which received Hill-Burton money found to be performing a state function, it would be difficult to make a distinction between those hospitals receiving such funds and those which did not. All would be assuming a duty of the state, regardless of government aid. In states receiving aid from the federal government, the capacity of every hospital in the state was taken into account in the state plan. Whether the expansion of these hospitals had been accomplished with or without Hill-Burton funds, it would have affected the state plan in precisely the same way. If, as the Assistant Attorney General argued,

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[29]In 1960 there were 92.9 persons per square mile in North Carolina.

[30]North Carolina Medical Care Commission, Report for the Biennium 1959-1961 and Summary of Activities, July 1, 1945-June 30, 1961 (Raleigh: North Carolina Medical Care Commission, 1961), p. 16.

"the number of beds in non-profit hospitals appears to be inadequate to meet the needs, the State would undoubtedly have to plan for beds in governmental institutions . . . ." any hospital, whether it had received aid or not, would be relieving the state of a burden. As the attorneys for Cone Hospital pointed out, " . . . a private hospital which does not receive any financial aid at all from the government is shouldering the assumed burden 'pro even more tanto'—so that under this reasoning, the more private it is, the more public it would become."[31]

If a distinction were to be made between hospitals receiving Hill-Burton aid and those not receiving it, it would have to be made only on the basis of the aid itself, but the Justice Department made no such claim. In fact, Marshall stated: "Nor do we urge that the receipt of government financial aid is sufficient, without more, to deprive an otherwise private institution of its non-governmental character."[32]

Despite the obvious difficulties presented by this theory, it is not one to be discounted. Although Judge Sobeloff did not base his decision on this reasoning, he called the Assistant Attorney General's argument "worthy of note" and went on to quote part of it:

> "Upon joining the program a participating State in effect assumes, as a State function, the obligation of planning for adequate hospital care. And it is, of course, clear that when a State function or responsibility is being exercised, it matters not for Fourteenth Amendment purposes that the * * * /institution actually chosen/ would otherwise be private: the equal protection guarantee applies."[33]

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[31]Falk and Roth, "Brief of Cone Hospital," p. 23.

[32]Marshall et al., "Brief for United States: Fourth Circuit Court of Appeals," p. 19.

[33]Quoted in Simkins v. Cone Hospital, 323 F. 2d 959 (4th Cir. 1963).

State Action in State Non-Action

A fourth method for the determination of state action in Simkins was suggested by the attorneys for the American Civil Liberties Union, who submitted a brief in the Circuit Court as amicus curiae.[34] Their position was that the principle of North Carolina law--action by the state--which denied the plaintiffs in this case a cause of action for damages or injunctive relief against the hospitals was unconstitutional. Although there was no North Carolina statute or judicial decision concerning discrimination against Negro doctors and patients by private hospitals, decisions in similar areas indicated that the plaintiffs did not have a cause of action against the hospitals, and to support this argument they quoted a decision of the North Carolina Supreme Court in State v. Avent.[35]

> No statute of North Carolina requires the exclusion of Negroes and of White people in company with Negroes from restaurants, and no statute in this State forbids discrimination by the owner of a restaurant of people on account of race or color . . . . In the absence of a

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[34]Rule 29, Federal Rules of Appellate Procedure, provides that a written brief of an amicus curiae may be filed only if it is accompanied by written consent of all parties or by permission of the court. Only under extraordinary circumstances will an amicus curiae be allowed to participate in the oral argument. The United States occasionally appears as amicus curiae in a case, and in its case, no consent of parties or permission of the court is required. More often, however, the United States intervenes as a party in litigation between private parties, as it did in the Simkins case. Whenever the constitutionality of a statute of the United States is drawn into question, the United States has a statutory right to intervene with all the rights of a party in the controversy.

[35]State v. Avent, 253 No. Car. 580, 118 S.E. 2d 47 (1961). This case was appealed to the United States Supreme Court where it was remanded to the North Carolina Supreme Court in light of Peterson v. Greenville. State v. Avent, 373 U. S. 375 (1962).

> Statute forbidding discrimination based on race or color in restaurants, the rule is well established that an operator of a privately owned restaurant privately operated in a privately owned building has the right to select the clientele he will serve . . . .[36]

Other "private" enterprises, including hospitals, the American Civil Liberties Union attorneys added, were generally held to be free to select their clientele on any basis.[37]

The issue, as the American Civil Liberties Union saw it, was whether this principle of North Carolina law violated the due process and equal protection clauses of the Fourteenth Amendment. It did, they reasoned, because "The only constitutional principle of North Carolina law there can be denoting legal relationships between these patients and doctors and the hospitals would be a principle forbidding the hospitals to utilize race as a standard for access to the benefits of the hospitals."[38] Thus, they concluded:

> The hospitals' motion to dismiss, based, as it must be on a principle of North Carolina law that they are permitted to discriminate, should not have been granted, for it is unconstitutional for North Carolina to fail to give plaintiffs the legal right to be free of racial discrimination on the facts of this case. It would be violative of the Fourteenth Amendment for a North Carolina State court to dismiss the plaintiffs' complaint,

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[36]Quoted by Marion A. Wright and John H. Wheeler, "In the United States Court of Appeals for the Fourth Circuit, G. C. Simkins, Jr., et al. and United States of America, Appellants v. Moses H. Cone Memorial Hospital, a Corporation, et al., Appellees, On Appeal from the United States District Court for the Middle District of North Carolina: Brief of the American Civil Liberties Union as Amicus Curiae," (New York: Hecla Press, 1963), p. 11. Hereafter cited as "Brief of American Civil Liberties Union."

[37]Ibid., p. 10.

[38]Ibid., p. 11.

> if this case were in a State court. The District Court should not, therefore, have dismissed the complaint, for that dismissal gave effect to an unconstitutional principle of State law.39

In other words, this rather novel position was that it was unconstitutional for a state not to make discrimination by private persons illegal. The absence of positive action on the part of the state should be considered "state action" for purposes of the Fourteenth Amendment guarantees.

There are some legal theorists who feel that the Fourteenth Amendment imposes upon the state a duty to eliminate racial discrimination in "private" areas. One view is that in the Civil Rights Cases of 1883 (109 U. S. 3) the Supreme Court frustrated the intention of the framers of the Fourteenth Amendment to provide the federal government with power over private violation of civil rights. The Court misconstrued the language of the Amendment and established the concept of positive state action which rendered Congress powerless in the face of state non-action. Justice Bradley said in the Civil Rights Cases that the Fourteenth Amendment " . . . nullifies and makes void all state legislation and state action of every kind which impairs . . . privileges and immunities, injures . . . without due process of law, or which denies . . . equal protection . . . ." If this were what the framers had meant, one theorist, Professor R. P. Peters, pointed out, the amendment would have read "No state shall make or enforce any law which shall abridge . . . , deprive . . . , or deny . . . ."[40] Peters

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[39] Ibid., p. 11.

[40] Roger Paul Peters, "Civil Rights and State Non-Action," Notre Dame Lawyer, XXXIV (May, 1959), 320.

continued:

> But this they did not do. What they did do was (1) prohibit the state from abridging the privileges and immunities of citizens of the United States designating with positive language (" . . . make or enforce . . .") the method by which abridgment must occur in order to fall within the prohibition; (2) prohibit the state from depriving any person of life, liberty, and property without due process of law, saying nothing about the method by which deprivation must occur . . .; (3) prohibit the state from denying any person the equal protection of the laws, again without designating how the prohibited denial must come about.[41]

The state could deny equal protection and due process in ways other than making or enforcing a law—by not making or enforcing a law when under duty to do so, he concluded. Since 1883, however, the theory that state non-action was sufficient to invoke the Fourteenth Amendment has not received the weight of judicial support.[42]

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[41] Ibid.

[42] Peters discusses decisions which indicate that there was some judicial acceptance of his view of the Fourteenth Amendment prior to 1883. In United States v. Given, 25 Fed. Cas. 1324 (C.C.D.Del. 1873), a case involving the refusal by state official to collect poll taxes from Negroes, the court said, "Undoubtedly, an act or an omission to act may be an offense both against the state law and the laws of the United States. Any other doctrine would place the national government entirely within the power of the state and would leave constitutional rights guarded only by the protection which each state might choose to extend to them." Ibid., quoted at p. 325. United States v. Hall, 26 Fed. Cas. 79 (C.C.S.D.Ala. 1871), involved the violation of the Civil Rights Act of 1870 by private individuals who banded together with intent to interfere with the right of freedom of speech and peaceful assembly of others. Peters quotes the decision in this case also: "Denying includes inaction as well as action, and denying the equal protection of the laws includes the omission to protect, as well as the omission to pass laws for protection." Ibid., at p. 327. Thus, the court upheld this section of the law because it ruled that Congress had the power to protect the rights of citizens against unfriendly and insufficient state legislation. Peters claims that there has been judicial support of his theory since 1883 and gives the examples of Picking v. Pennsylvania R. R., 151 F. 2d 240 (3rd Cir. 1945), and Lynch v. United States, 189 F. 2d 476 (5th Cir. 1951). Like the Given case, however, both of these cases involved incorrect enforcement or failure on the part of a state official to enforce a state law. While the courts have held improper enforcement of a law to be state action, they have not included in that definition of state action the failure of a state to positively guarantee Fourteenth Amendment rights against private violation.

In view of the 1883 Civil Rights Cases, the dismissal of the plaintiffs' complaint by a state court would not necessarily, as the American Civil Liberties Union alleged, be violative of the Fourteenth Amendment. Although state courts cannot put their weight behind racial discrimination by enforcing private agreements which abridge the Fourteenth Amendment guarantees to Negroes (Shelley v. Kraemer, 334 U. S. 1 /1948/), in the absence of such an agreement which depended on the court for enforcement, that court could only apply the reasoning that the Fourteenth Amendment does not apply to actions solely private in character. Nor did the District Court's decision in effect uphold an unconstitutional principle of North Carolina law, because it was not this principle of law that the defendants relied on as a basis for their motion to dismiss the complaint, but, rather, the standard interpretation of the Fourteenth Amendment--that the prohibitions are against the state, not private persons.

The attorneys for Cone Hospital dismissed the argument by saying:

> Discrimination by private persons is not itself violative of the Fourteenth Amendment. It is therefore difficult to credit as a serious one the suggestion that the mere omission of the State to make illegal this permissible conduct is violative of the same Fourteenth Amendment--that all under the one amendment the state commits a crime in failing to make a crime of that which is admittedly not a crime.[43]

And apparently the court in Simkins was not willing to give this view serious attention either, for it made no mention of the American Civil Liberties Union's brief.

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[43]Falk and Roth, "Brief of Cone Hospital," p. 32.

Totality of Government Involvement

A fifth applicable test is whether the state has become so involved in private conduct that it might be considered action of the state for purposes of the Fourteenth Amendment. This theory, that each government involvement with the hospitals, although insufficient individually to bring the hospitals under the Fourteenth Amendment, should count cumulatively on the scale for determining state action, was submitted by the plaintiffs. Although the Circuit Court counted as significant only those contacts arising as a result of the Hill-Burton Act and discounted the other involvements presented by the plaintiffs, it did base its decision on this reasoning.[44]

Judge Haynsworth, dissenting, called the Simkins decision "unprecedented:" Chief Judge Sobeloff held that " . . . this case is controlled by Burton, . . ."[45] Had the Supreme Court in Burton v. Wilmington Parking Authority accepted the "totality of government involvement" test, or had Simkins written this new concept of state action into constitutional law?

The Burton case concerned the refusal of service to a Negro by the Eagle Coffee Choppe, a private restaurant located in a city-owned automobile parking building in Wilmington, Delaware. The owner of the

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[44]Plaintiffs had urged consideration of a number of involvements other than those resulting from the Hill-Burton program: state licensing of the hospitals, tax-exempt status of the hospitals, the appointment of six trustees of Cone Hospital by public authorities, and the training program for student nurses conducted at Cone. Greenberg et al., "Brief of G. C. Simkins," pp. 27-29, 33-36.

[45]Simkins v. Cone Hospital, 323 F. 2d 959 (4th Cir. 1963).

restaurant had leased the property from the Wilmington Parking Authority and derived much of his business from patrons of the public parking building. The Court began its decision in this case by saying, "Only by sifting the facts and weighing circumstances can the nonobvious involvement of the state in private conduct be attributed its true significance."[46]

In general, the circumstances weighed by the Court were the following: the restaurant was located on land and in a building which were publicly owned and dedicated to public use; the commercially leased area was physically and financially an integral, indispensable part of the State's plan to operate its project as a self-sustaining unit; maintenance (including repairs and heating) of the building was the responsibility of the Authority and payable out of public funds; the restaurant and Parking Authority conferred on each other a variety of mutual benefits; and any improvement effected in the leasehold by Eagle would not result in increased taxes since the fee was held by a tax-exempt government agency; and profits earned by discrimination contributed to the financial success of a government agency. The Court then declared:

> Addition of all these activities, obligations and responsibilities of the Authority, the benefits mutually conferred, together with the obvious fact that the restaurant is operated as an integral part of a public building devoted to a public parking service, indicates that degree of State participation and involvement in discriminatory action which it was the design of the Fourteenth Amendment to condemn.[47]

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[46]Burton v. Wilmington Parking Authority, 365 U. S. 715 (1961).

[47]Ibid.

The Court concluded its decision in Burton, however:

> Because readily applicable formulae may not be fashioned, the conclusions drawn from the facts and circumstances of this record are by no means declared as universal truths on the basis of which every State leasing agreement is to be tested. . . . Specifically defining the limits of our inquiry, what we hold today is that when a State leases public property in the manner and for the purpose shown to have been the case here, the proscriptions of the Fourteenth Amendment must be complied with by the lessee as certainly as though they were binding covenants written into the agreement itself.[48] (Emphasis mine)

Exactly what principle might be drawn from Burton is uncertain. There is some reason to believe, as Judge Sobeloff did, that the Court had broken new ground in the interpretation of state action by basing its decision on the "totality of government involvement" theory. That is, instead of disregarding each connection with government which was insufficient in itself to satisfy the requirement of state action, the Court assigned some weight to each of these involvements and evaluated the case on the basis of the total weight. The method employed by the Court, that of examining the various connections, and its statement that "Addition of all these activities" indicate that it had subscribed to a new theory. Even the dissenting opinion of Justice Harlan (in which he was joined by Justice Whittaker) suggests that Burton was not just another "leasing case:"

> The Court's opinion, by a process of first undiscriminatingly throwing together various factual bits and pieces and then undermining the resulting structure by an equally vague disclaimer, seems to me to leave completely at sea just what it is in this record that satisfies the requirement of "state action."[49]

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[48] Ibid.

[49] Ibid.

It is perhaps more reasonable to take another view of the case, however. There is much to indicate that the Burton decision was merely another of the well-established leasing cases.[50] Since the various connections between the Eagle Coffee Shoppe and government were a result of the restaurant's lease with the Wilmington Parking Authority, it would seem that the lease was the crucial factor. It was the addition of the activities of the Parking Authority, the mutual benefits to Parking Authority and restaurant by the arrangement, " . . . together with the obvious fact that the restaurant is operated as an integral part of a public building devoted to a public parking service . . . ." which the Court found to be significant in the establishment of state action.[51] Moreover, the Court went on to speak of the case as if it

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[50]There are many decision in which the courts have concluded that discrimination by a private lessee of public property is forbidden by the Constitution. See, for example, Muir v. Louisville Park Theatrical Association, 347 U. S. 971 (1954); City of Greensboro v. Simkins, 246 F. 2d 425 (4th Cir. 1957); Wimbish v. Pinella County Florida, 342 F. 2d 804 (5th Cir. 1965); Derrington v. Plummer, 240 F. 2d 531 (5th Cir. 1956), cert. denied, 353 U. S. 924 (1957); Hammond v. University of Tampa, 344 F. 2d 951 (5th Cir. 1965); Tate v. Department of Conservation, 231 F. 2d 615 (4th Cir. 1956).

[51]The facts and decision in Burton closely resemble those in Derrington v. Plummer, 240 F. 2d 531 (5th Cir. 1956), cert. denied, 353 U. S. 924 (1957). Derrington involved discrimination in a privately operated cafeteria which was located in the basement of a county courthouse and which was leased from the county. The court took into account the fact that the courthouse had been built with public funds for the use of citizens generally and that the county furnished water, electricity, heat and air conditioning to the lessee. The purpose of the lease was to furnish cafeteria service for the benefit of persons who had occasion to be in the courthouse. If the county had rendered such a service, the court held, its actions would be subject to the Fourteenth Amendment and the same result follows when the service is rendered through the instrumentality of a lessee. There were the same categories of activities as in Burton: the activities of the courthouse, mutual benefits, and the restaurant's being an integral part of a public building devoted to public use.

were essentially a leasing case when it added that its conclusions were not to be considered " . . . universal truths on the basis of which every State leasing agreement is to be tested." Finally, in clarification of the issue, the Court concluded " . . . what we hold today is that when a State leases public property in the manner and for the purpose shown to have been the case here, the proscriptions of the Fourteenth Amendment must be complied with by the lessee . . . ."

That Burton might not stand alone as precedent for application of the "totality of government involvement" test is suggested by the decision in the Eaton case which was brought up again after the Simkins decision. The court did not refer to Burton alone but said, "Because of the Burton and Simkins decisions . . . a new and independent examination must be made of the relationship between the governmental bodies and the James Walker Memorial Hospital."[52] Two judges (Haynsworth and Boreman), who had dissented in Simkins, concurred only on the basis of Simkins which they considered binding even though they were still unpersuaded of the correctness of that decision. And in a later decision, this phenomenon was called the "Burton-Simkins analysis."[53]

Despite the resulting confusion as to its meaning, the Burton case can clearly be placed in the leasing category. Whether it suggested a new theory of state action is relatively unimportant because the fact that there was a government lease involved prevented a clear application

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[52]Eaton v. Grubbs and Board of Managers of James Walker Memorial Hospital, 329 F. 2d 710 (4th Cir. 1964).

[53]Smith v. Hampton Training School for Nurses, 360 F. 2d 577 (4th Cir. 1966).

of the "totality of government involvement" test. There was one connection between the Eagle Coffee Shoppe and government which was of itself sufficient to invoke the Fourteenth Amendment--the lease. In Simkins, on the other hand, no connection between the hospitals and government was in itself sufficient for a finding of state action, yet the total of these contacts was held to fulfill the requirement.[54] In Simkins, for the first time, the "totality of government involvement" test was clearly applied, and a new concept of state action was written into constitutional law.

There are a number of problems inherent in this new view of state action. Exactly how much involvement with government is necessary to render an otherwise private institution's actions subject to the Fourteenth Amendment prohibitions? Would any smaller combination of contacts in Simkins have been sufficient? Precisely what does it take to satisfy the state action requirement under this new test?

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[54]As noted earlier, Sobeloff attached significance to four factors in the Simkins case: the provision of the Hill-Burton Act that the United States could recover part of its grant to a hospital should that hospital cease to be nonprofit or be sold to anyone not approved by the Hill-Burton state agency; the Act's requirement that the state set minimum standards for maintenance and operation of hospitals receiving Hill-Burton aid and North Carolina's licensing law in fulfillment of that requirement; federal standards for the number of facilities required to provide adequate service and the manner in which a state agency was to determine the priority of projects; and the requirement of a state plan which met the requirements as to lack of discrimination on account of race and for furnishing hospital services to the indigent. Each of these factors alone would not have been sufficient to find state action under the control test, affection with a public interest test, or the essential function of the state test.

The majority in Simkins agreed that "Not every subvention by the federal or state government automatically involves the beneficiary in 'state action,'. . ." but when either government gives financial assistance it is usually significantly involved with the recipient in order to insure proper expenditure of the funds. Might not this legal rule embrace, as well as Hill-Burton hospitals, as attorneys for Cone and Long suggest, " . . . the private denominational college with a grant in aid of research from such a Federal source as the Small Business Administration . . . and by inevitable extension, it would bar not only discrimination by the college but also its chapel services."[55] Also, as a result of the legal rules established in Engel v. Vitale,[56] School District of Abington v. Schempp,[57] and Simkins, might not a parochial school which enters into an agreement with the state concerning the use of public school buses, driver education courses, or other public school benefits which private and religious schools lack, become sufficiently involved with government to render it an agent of the state, like a public school, in which required prayers constitute a violation of the First Amendment? Theoretically speaking, if there is sufficient state action to invoke the Fourteenth Amendment, is there not also enough to invoke the First?[58]

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[55]Roth and Brooks, "In the Supreme Court: Petition for a Writ of Certiorari," p. 9.

[56]370 U. S. 421 (1962).

[57]374 U. S. 203 (1963)

[58]The First Amendment originally applied only to the federal government but since Cantwell v. Connecticut, 310 U. S. 296 (1940), it has been held to apply to the state through the Fourteenth Amendment.

How this new test for determining state action will be utilized, of course, remains to be seen. It is perhaps even less clear where the line between public and private action falls, but one thing is clear: the category of actions that may be labeled "government" has been greatly enlarged by the theory of state action established in Simkins.

CHAPTER VI

THE SIMKINS CASE AND NONDISCRIMINATION

The potential effect of Simkins on racial discrimination in medicine was staggering. Overnight 6,000 hospitals found themselves legally transformed from private institutions to agents of the state for purposes of the Fourteenth Amendment. As had been speculated in the early stages of litigation:

> If the Justice Department prevails in this suit, just imagine what can happen! Six thousand hospitals which in the past, whether or not they had "separate-but-equal" waivers, have regarded themselves as private institutions and thus free to accept or bar whomever they wanted, will now . . . find themselves on a very different footing.[1]

Although today the value of Simkins as a weapon against racial segregation and discrimination in medical facilities has been largely overshadowed by the combined effects of Title VI of the 1964 Civil Rights Act and the 1965 Medicare Act, it is not to be discounted. The decision in this case was the first step taken in the desegregation of federally assisted medical facilities and it represented a turning point in the fight for nondiscrimination requirements in all government-assisted programs.

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[1]John A. Kenney, "Medical Civil Rights," National Medical Association Journal, LV (September, 1963), 431.

Immediate Results of the Ruling

Those who had fought for the desegregation of medical facilities were almost afraid to respond to the Supreme Court's denial of certiorari with optimism. The decision was obviously a step toward ending segregated medical facilities, but what practical effect would it have? Jack Greenberg said the decision would " . . . put an end to keeping Negroes out of white hospitals or segregating them within the hospitals . . ." and it would " . . . be an entering wedge for Negro physicians into the mainstream of medical practice in the South."[2] He added, however, "We wait to see whether the medical profession will voluntarily follow the law or whether a long,hard process of litigation such as we have had with the schools will be necessary."[3] On March 3, 1964, Senator Javits called the Supreme Court's action of the day before "a most welcome development,"[4] but he, too, had reservations: "The other side of the coin remains unclear. This is the question of whether HEW will now deny further Federal tax money to applicants for new or additional segregated hospitals."[5]

Even before the two hospitals directly involved in the decision were affected, however, the Public Health Service began to act.[6] Immediately after the Circuit Court's decision in November, 1963, it moved

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[2]New York Times, March 3, 1964, p. 1.

[3]Ibid.

[4]U. S., Congressional Record, 88th Cong., 2d Sess., 1964, CX, Part 3, 4183.

[5]Ibid., 4186.

[6]The order enjoining Cone and Long hospitals from discrimination on the basis of race was entered April 16, 1964, in the Court for the Middle District of North Carolina.

to suspend approval of all new applications for "separate but equal" facilities.[7] On March 9, 1964, a week after the Supreme Court denied certiorari, the Secretary of the Department of Health, Education and Welfare, Anthony Celebrezze, announced the new nondiscrimination requirements to implement the Simkins decision. The suspension of "separate but equal" applications was made permanent, and assurances of nondiscrimination applying to admission of patients as well as staff privileges were to be required of future applicants. Significantly, nondiscrimination in admission of patients meant that patients would have access to all portions of the facility. Formerly, hospitals of the "nondiscriminatory" variety could deny a Negro access to those sections of the facility which had not been constructed with federal funds.[8]

Hill-Burton projects which had already been completed were unaffected by the new regulations but those still under construction were brought in line with the new policy. As a condition for continuing to receive aid, assurances of nondiscrimination in admissions were required from the sponsors of eight "separate but equal" facilities which were unfinished at that time.[9] In response to a request by the Public Health Service, the sponsors of almost 700 of the 835 "nondiscriminatory" facilities under construction gave assurance that staff privileges

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[7]U. S. Commission on Civil Rights, Equal Opportunity in Hospitals and Health Facilities, p. 7.

[8]Ibid.

[9]Ibid., p. 8.

would be available without discrimination on account of race.[10]

Amending the Hill-Burton Act

For several years prior to the Simkins case there had been a number of attempts in the Congress to delete the "separate but equal" provision of the Hill-Burton Act. In September, 1961, Senator Javits introduced such a bill, but it died in committee.[11] Representative Diggs introduced a similar bill (H. R. 12319) in the House in June of 1962.[12] Other efforts in February, March, and May of 1963 were also unsuccessful in eliminating discrimination in the Hill-Burton program.[13]

Another way to effect nondiscrimination in the Hill-Burton program was through an amendment to any appropriation bill for the program. This, too, was tried. On March 27, 1962, Representative Ryan introduced an amendment to the appropriation bill for the departments of Labor and Health, Education and Welfare:

> Provided further, that no amounts appropriated in this paragraph may be used for grants or loans for any hospital, facility or nursing home established, or having separate facilities, for population groups . . . .[14]

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[10] Ibid. As was discussed in Chapter I, nondiscriminatory facilities admitted Negro patients but were under no obligation to have a nondiscriminatory policy with respect to staff privileges.

[11] U. S., Congressional Record, 87th Cong., 1st Sess., 1961, CVII, Part 16, 20973.

[12] Ibid., 88th Cong., 1st Sess., CIX, Part 2, 2482.

[13] On February 18, 1963, H. R. 3854 to amend the Hill-Burton Act was introduced. Ibid., 88th Cong., 1st Sess., CIX, Part 2, 2482. There were two bills introduced for this purpose in March, 1963: H. R. 4436 on March 4 (Ibid., Part 3, 3428) and S. 1218 on March 28 (Ibid., Part 4, 5021). H. R. 6330 was introduced May 15, 1963. Ibid., Part 7, 8623.

[14] Ibid., 87th Cong., 2d Sess., 1962, CVIII, Part 4, 5164.

The House rejected Ryan's amendment, and in July, 1962, when the same appropriation bill was being considered in the Senate, Javits proposed a similar amendment to end the spending of federal funds for segregated hospitals. Javits' amendment also failed to become law.[15] Again, in August of 1963, Senator Javits attempted, unsuccessfully, to end discrimination in the Hill-Burton program by amending an appropriation bill.[16]

In view of the recent history of attempts to change the "separate but equal" policy of the Hill-Burton program, it was very significant that the Supreme Court's denial of certiorari in the Simkins case occurred when the House Committee on Interstate and Foreign Commerce was holding hearings on the Hospital and Medical Facilities Amendments of 1964 (H. R. 10041). The purpose of this bill was primarily to enlarge the Hill-Burton program, but it also proposed to delete the "separate but equal" provision of the law. There was one last attempt to circumvent the effects of the Simkins decision. On March 12, 1964, Dr. Francis Coleman, representing the American Medical Association, appeared before the committee and recommended the amendment, "Nor shall the acceptance of funds by a private facility under this title be construed as making that facility a public institution."[17] Secretary Celebrezze, however,

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[15] Ibid., Part 11, 14309.

[16] Ibid., 88th Cong., 1st Sess., CIX, Part 11, 14494.

[17] "Celebrezze Testimony on Non-discrimination Under Hill-Burton Law Before the Committee on Interstate and Foreign Commerce, U. S. House of Representatives," National Medical Association Journal, LVI (May, 1964), 287.

emphasized in his testimony that "Any consideration of this question must be made in light of the recent decision . . . in the case of Simkins v. Moses H. Cone Memorial Hospital."[18] Simkins, he reminded the committee, stated the public policy that was then guiding HEW, and he enumerated the steps that had been taken to implement that decision.

Congress, in the end, partially followed the policy which had been pronounced in Simkins. On August 18, 1964, H. R. 10041 became Public Law 88-443. The "separate but equal" provision was deleted, but section 603 (e) of that act provided that in order to receive Hill-Burton funds, an applicant must give assurance that:

> (1) the facility or portion thereof to be constructed or modernized will be made available to all persons residing in the territorial area of the applicant: . . .[19]

Thus, Congress prohibited discrimination only in those portions of the facility which benefited from federal aid, not the entire facility. Under the Simkins rule, the entire hospital would be found subject to the Fourteenth Amendment and be required to be nondiscriminatory, not just the part of the facility which was constructed or modernized with federal aid.

Congress had not gone as far as the decision, and theoretically there could, on the basis of the law alone, still be discrimination in a Hill-Burton hospital which granted the assurances requested. By August of 1964, however, this made little difference because the 1964 Civil

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[18] Ibid., 286.

[19] Hospital and Medical Facilities Amendments of 1964, in U. S., Statutes at Large, LXXVIII, 447.

Rights Act had been passed in July. Title VI of that act, which required that there be no discrimination on the basis of race in federally assisted programs, had already eliminated the possibility of discrimination on the part of future recipients of Hill-Burton funds.

The Civil Rights Act of 1964: Title VI

The Simkins decision was also directly pertinent to other matters before the Congress in the spring of 1964. "The decision could have some impact on the forthcoming civil rights debate in the Senate," the New York Times suggested.[20] Arthur Krock, in an editorial on March 5, however, was a little more positive about the impact of the decision. Timing was the most significant feature of the Court's decision to deny certiorari, he claimed:

> In this instance it was known to all concerned--including the Court, which also reads the newspapers--that Senate opponents of this particular section (Title VI of the equal rights bill) were preparing a last-ditch effort to legislate the exemptions which were outlawed in the lower court decision it allowed to stand. This being so, and in view of the additional fact that the Supreme Court can indefinitely postpone announcing whether it will review a lower court decision, it must be concluded that the Court was fully aware its timing in the case would cut the ground away from the effort in the Senate to maintain in Title VI the exemption authorized in the Hill-Burton Act.[21]

Thus, Krock felt that the Simkins case would very definitely have an impact on the civil rights debate, for the effect of the Supreme Court's action

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[20]March 3, 1964, p. 1.

[21]"A Court Ruling Extended to Pending Legislation," New York Times, March 5, 1964, p. 32.

was " . . . to validate, as mandatory under the Constitution, a hotly disputed section of this legislation in advance of Congressional action."[22]

Those who opposed Title VI of the Civil Rights Bill had a number of arguments. Many of them felt that this title created new and virtually unlimited powers for the Administration. Senator Talmadge said, speaking of Title VI: "This proposal would authorize a Federal official to disregard the acts of Congress from the beginning of Congress to the present time, and disregard, in totality appropriations, and say, 'I am the law; I am the rule; you must do it my way.'"[23] Other opponents of Title VI argued that Congress had always frowned upon blanket amendments to existing statutes, yet this title would amend almost every federal law appropriating funds for programs.[24] Senator Eastland submitted a list of over 100 programs which would be affected by the title in support of this proposition.[25] And Senator Stennis also objected to the changing of so many programs with "one stroke of the pen."[26]

To counter these arguments, proponents of Title VI relied heavily on the Simkins decision. Javits answered his opponents, " . . . Title VI does not create any new legal or administrative powers. The spending of Federal tax revenues . . . for segregated programs is not only morally

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[22]Ibid.

[23]U. S., Congressional Record, 88th Cong., 2d Sess., 1964, CX, Part 4, 5253.

[24]Ibid., 5087.

[25]Ibid., Part 5, 5871.

[26]Ibid., 5793.

wrong but a clear violation of the fifth amendment, as the Federal Courts have recently held in the case of the Hill-Burton Hospital Construction Act."[27] Senator Kuchel argued, "In my judgment, the President has clear authority now under the Constitution to eliminate discrimination in federally assisted programs. Those statutes which did sanction 'separate but equal' hospitals, schools and colleges are patently unconstitutional and in the case of hospitals this has recently been affirmed by the Supreme Court."[28]

Other members of the opposition took the position that since the Administration already had the power to require nondiscrimination in federal programs, Title VI was unnecessary.[29] Senator Pastore thought the Simkins decision dictated otherwise, however:

> The Supreme Court declined to review that decision; so it is the law of our land. Yet despite the effort of the court of appeals to strike down discrimination in the Simkins case, the same court was forced last week to rule again in a Wilmington, N. C. suit that a private hospital operated with public funds must desist from barring Negro physicians from staff membership.[30]

Title VI was very necessary, he thought, because there were " . . . several instances, such as the Simkins case in Greensboro, N. C. where suit was

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[27] Ibid., Part 6, 7102.

[28] Ibid., Part 5, 6561.

[29] This was Senator Byrd's view. He cited the Simkins decision and Executive Order No. 11114, which required that there be no racial discrimination in federally assisted construction contracts. Ibid., Part 6, 8047.

[30] Ibid., 7054.

instituted because certain hospitals would not admit Negro patients. It is necessary to litigate again, again, and again because the Supreme Court can only strike down segregation in the particular case before it."[31] Also, it was pointed out that without Title VI there would still be discrimination in many government programs because of differences in existing statutes, especially under those laws which contained "separate but equal" provisions, such as the Morrill Act of 1890 (Land Grant College Act) and the School Construction Act of 1950.[32] In reference to these acts Senator Humphrey said, "It may be that all of these statutory provisions are unconstitutional and separable as the Court of Appeals for the Fourth Circuit has recently held in a case under the Hill-Burton Act. . . . But it is certainly desirable to wipe them off the books without waiting for further judicial action."[33]

It is quite clear from the debates in the Senate that the Simkins decision had cut the ground from under the arguments of opponents of Title VI. The ruling had presented the Congress with a fait accompli. It is conceivable that Title VI might not have become law without the support given its proponents by the Simkins decision. It is more probable, however, that a Congress which, as recently as August, 1963, had refused to eliminate discrimination in the Hill-Burton program, might have passed a considerably weaker ban on discrimination in government-assisted programs had it not been for the Supreme Court's action. Surely knowledge

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[31] Ibid., 8057.

[32] Ibid., Part 5, 6050.

[33] Ibid., 6544.

that any exemptions written into the title might be subsequently declared unconstitutional on the basis of Simkins discouraged, if it did not preclude, efforts to legislate exceptions to the title. Moreover, the Simkins case enabled many to agree with Senator Pastore when he confidently said, "Title VI is sound; it is morally right; it is legally right; it is constitutionally right."[34]

The Courts

Title VI regulations did not reach health facilities which had been completed and those which no longer received federal financial aid after January 4, 1965. In the absence of voluntary racial integration, the medical facilities which had received government aid prior to 1965 could be desegregated by court action applying the Simkins ruling.

A few medical facilities' discriminatory practices have been halted by the legal remedy afforded Negroes by Simkins. The case of Eaton v. James Walker Memorial Hospital (which the defendants in Simkins had urged was controlling in their case) came before the courts again. The court held that because of Burton and Simkins a new examination had to be made of the facts in Eaton.[35] The court ruled that the Simkins case was controlling, thus the Walker Hospital was found subject to the requirements of the Fourteenth Amendment. In February of 1965, a federal district court in South Carolina applied the Simkins ruling to a case involving discrimination in Orangeburg Regional Hospital.[36]

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[34]Ibid., Part 6, 7054.

[35]Eaton v. Grubbs and Board of Managers of James Walker Memorial Hospital, 329 F. 2d 710 (4th Cir. 1964).

[36]Rackley v. Board of Trustees of Orangeburg Regional Hospital, 238 F. Supp. 512 (E.D.S.C. 1965).

In 1966, another case, Smith v. Hampton Training School for Nurses,[37] was decided on the basis of Simkins. Thus, the case itself set a precedent which proved useful in eliminating racial discrimination in medical facilities.

Litigation on the basis of Simkins might be necessary even today had Congress not enacted the Medicare Act in the summer of 1965. In order to receive funds under Medicare, a hospital was required to comply with the provisions of Title VI of the Civil Rights Act of 1964. If a hospital failed to comply, it could not receive Medicare patients and would not be able to apply for grants under other federal programs. Since most hospitals could not afford to refuse Medicare patients, this law has in effect eliminated the use of Simkins for purposes of desegregation of medical facilities.

Although there is no longer much need to appeal to the Simkins decision in the area of medicine, the precedent set in the case might be of use for desegregation in other areas. Although the court said "Not every subvention by the federal or state government automatically involves the beneficiaries in 'state action' . . ." a great deal of "involvement" between recipient and donor usually results from government aid. Many institutions which had received government (state or federal, or both) aid before 1964 could be enjoined from discriminatory action on the basis of Simkins. For example, suit could probably be brought successfully against businessmen or private colleges which had received assistance from government prior to 1964 for racial discrimination.

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[37] 360 F. 2d 577 (4th Cir. 1966).

The case of Simkins v. Cone Hospital has been most significant in eliminating discrimination on account of race in medical facilities throughout the United States. It has not only afforded a legal remedy for the desegregation of 6,000 hospitals through court action, but it also induced the Congress to amend the Hill-Burton Act to end future discrimination in that program. Its significance, however, goes beyond medicine to reach virtually all government-assisted programs. The principle established in Simkins is applicable to other controversies which might arise concerning racial discrimination by private institutions which have at one time received government aid. Finally, although the degree of importance is difficult to determine, Simkins certainly played a significant role in the passage of the 1964 Civil Rights Act's Title VI, which ended legal discrimination in federally assisted programs after January, 1965.

CONCLUSION

Before the decision of G. C. Simkins et al. v. Moses H. Cone Memorial Hospital et al., discrimination against Negro doctors and patients was practiced throughout the entire United States. A variety of discriminatory methods were employed by medical facilities, and a national law, the Hill-Burton Act, provided for the appropriation of funds to build "separate but equal" hospitals. Under this statute even hospitals receiving aid on a "nondiscriminatory" basis could refuse Negroes access to portions of the facility not built with federal funds and refuse staff privileges to qualified persons on the basis of race. By 1963, over 6,000 hospitals in the United States had received Hill-Burton aid and regarded themselves as private institutions. The Simkins decision ended that illusion.

While Simkins was still in the process of appeal, Constance B. Motley wrote, "A victory in this case would be as significant, in my judgment, as the school desegregation decision because of the tremendous number of hospitals in this country receiving such federal assistance."[1] Aside from the sheer number of hospitals which could be desegregated by court action on the basis of Simkins, however, the case had significance for integration in other ways. The Department of Health, Education and Welfare acted to prevent future discrimination in the

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[1]"Desegregation, What it Means to the Medical Profession and the Responsibilities it Places on the Negro Professional," National Medical Association Journal, LV (September, 1963), 442.

Hill-Burton program by changing the regulations of the program to comply with Simkins, and the Congress finally amended the Hill-Burton Act to end the financing of "separate but equal" facilities, something it had refused to do as recently as August, 1963. The Supreme Court's denial of certiorari occurred at the time the Senate was considering the 1964 Civil Rights Bill, and although the case may not have been the only factor insuring passage of Title VI, it certainly destroyed the possibility that certain exceptions to that title would be written into the law. As a result of Title VI, virtually all programs receiving federal assistance after January, 1965, were required to be free of racial discrimination.[2] Simkins took the first step: Congress followed.

The importance of Simkins does not end with desegregation of medical facilities or other institutions which have received government aid. This decision wrote into constitutional law a new concept, a new theory of state action. Since 1883, the judiciary has been bound by the principle that the Fourteenth Amendment does not apply to private actions but to those of the state. While continually expanding the definition of state action, the courts sedulously denied departing from the rule established in the 1883 Civil Rights Cases. Through long years of litigation, state action gradually evolved to include such things as the actions of private lessees of public property, private organizations performing a function of the state, and private institutions under the control of the state. With the new test developed in Simkins, practically

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[2]This is not to say that there is no longer any racial discrimination in federally assisted programs, or even to say that there is no longer any discrimination in medical facilities. The discrimination that does exist, however, is not legal as it had been in many cases prior to Simkins, the 1964 Civil Rights Act, and Medicare.

any private institution may be brought within the Constitution's reach. Hardly any institution, or person, for that matter, is free of involvement with government. Exactly how many government involvements and how much weight each should contribute to reach a significant total on the state action scales is not clear. The court presented in Simkins a new test for finding state action, but it neglected to state what it takes to satisfy the requirements of that test. In Simkins the court took another step away from the 1883 Civil Rights Cases without overruling the precedent established in that decision. Perhaps the Civil Rights Cases have been overruled--for if the line between state and private action has not been erased, it has certainly been shifted to include a great number of formerly private institutions within the definition of state action.

Judged both on the basis of its effect on racial discrimination and its effect on constitutional law, Simkins v. Cone Hospital has earned the designation, "landmark decision."

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